No. 2643.

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit.

SOUTHERN PACIFIC COMPANY, a corporation,
Plaintiff in Error,
vs.
CALIFORNIA ADJUSTMENT COMPANY, a corporation,
Defendant in Error.

ORAL ARGUMENT AND SUPPLEMENTAL BRIEF ON BEHALF OF PLAINTIFF IN ERROR

In Error to the United States District Court for the Northern District of California, Second Division.

HENLEY C. BOOTH,
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Attorneys for Plaintiff in Error.

WM. F. HERRIN,
Of Counsel.

No. 2643

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit.

BEFORE:

HON. WM. B. GILBERT, Circuit Judge,
HON. ERSKINE M. ROSS, Circuit Judge, and
HON. FRANK M. RUDKIN, District Judge.

SOUTHERN PACIFIC COMPANY, a corporation,

Plaintiff in Error,

vs.

CALIFORNIA ADJUSTMENT COMPANY, a corporation,

Defendant in Error.

Oral Argument: Tuesday, November 9, 1915

APPEARANCES:

For Plaintiff in Error, HENLEY C. BOOTH, ESQ.
For Defendant in Error, ALFRED J. HARWOOD, ESQ.

Mr. Booth: May it please the Court: I think it perhaps the proper function of this oral argument only to deal with questions which the plaintiff in error feels have not been sufficiently treated in

the printed brief, and in so far as the plaintiff in error may do so, to answer whatever may have been raised in the brief filed by the defendant in error. On account of the length of both briefs, the brief of the defendant in error was somewhat delayed, and was not served on me until yesterday; therefore, I do not know that I can at this time sufficiently answer, if answer be required, a number of the authorities cited in his brief. If at the end of this argument the Court feels that the novelty and the importance of the case is sufficient to justify a request on our part to file either a supplement to our opening brief, or an answering brief, I shall ask permission of the Court to do so.

The case, as I have already intimated, is a case both of novelty and importance. The importance of the case is not measured by the amount involved. There are a number of cases pending in the State Courts of California which involve the validity of claims just such as those sued upon here. I may say, also, that the case is novel, because the Supreme Court of the State of California has never passed upon most of the salient points of this appeal.

Briefly, the case is this: There are two classes of claims sued upon; it is on the law side of the Court; there are 120 counts in the complaint; part of the counts are based upon an alleged violation by the plaintiff in error, a railroad carrier, of the so-called long and short haul clause of the California constitution as it existed from the year 1879 until its amendment on October 10, 1911. The remainder of

the 120 counts are based upon a violation of the long and short haul clause of the California constitution as it was amended on October 10, 1911, and as it exists at the present time. The Court will find, beginning at page 4 of the brief of the plaintiff in error, a copy of the provision of the constitution of 1879. Your Honors will also find, beginning at page 6 of the brief of the plaintiff in error, a copy of the constitutional provisions as they were amended on October 10, 1911.

Now, as to the pleading of these respective counts I have said that they were on the law side of the Court; but perhaps that is not a sufficiently definite statement. Each of these counts alleges that the assignor of plaintiff paid on a certain day for the transportation of a certain commodity between certain points in California, a sum which was in excess of the sum then charged by the railroad carrier for the transportation of the same commodity to a more distant point on the same line or route. And—and I shall come to the point of this presently—it is not alleged in any of these counts that the rate actually charged and collected by the railroad company was unreasonable in and of itself; neither is it alleged in any of these counts, nor was it proven on the trial or attempted to be proven on the trial by evidence on the part of the defendant in error, that the assignors of the defendant in error, or any of them, had been damaged by the collection of the charge which the defendant in error characterizes as an excessive charge. And so the question squarely comes down to whether the defendant in error here

had or has, irrespective of the reasonableness of the charge collected, and irrespective of whether or not he claims to have been damaged, an action at law for the recovery of a rate charged in apparent violation of the sections of the Constitution as it existed before October 10, 1911, or as to the second class of cases, as the same section existed after October 10, 1911.

As the 120 counts in this case naturally fall into one or the other of two classes, the second class, as pointed out in the brief—and I will not elaborate that on the oral argument—is perhaps susceptible of division into two or more classes.

As the counts fall naturally on the one or the other side of October 10, 1911, so do the questions of law involved in this proceeding fall naturally into questions peculiarly federal in their nature and questions peculiarly state in their nature.

The Constitution of 1879, Article 12, Section 21, provided:

> "No discrimination in charges or facilities for transportation shall be made by any railroad or other transportation company between places or persons, or in the facilities for transportation of the same class of freight or passengers within this State or coming from or going to any other State. Persons and property transported over any railroad or by any other transportation company or individual shall be delivered at any station, port or landing at charges not exceeding the charges for the transportation of persons and property of the same class in the

same direction to any more distant station, port or landing."

Taking up, then, the assault upon the provisions of this section, which is based on the provisions of the Federal Constitution, we say, first, that this section standing alone, as counsel here would endeavor to construe it, does attempt to regulate interstate commerce, and counsel, I think, in his brief, and possibly in his oral argument, will make sufficiently plain the fact that he does consider the section standing alone as a mandatory and prohibitory section which could not be violated either by the carrier or by the Railroad Commission. But does this section standing alone in terms and in and of itself evince an intention upon the part of the framer of the section and upon the part of the people of the State of California when they adopted it, to directly control and regulate interstate commerce.

And secondly: If it does evince that intention, does it, if such intention is clearly shown, necessarily, in and of itself and by the application of it in terms, regulate and control interstate commerce?

And thirdly: If the section in part attempts to regulate and control interstate commerce, is the part of the section which so attempts to regulate and control that interstate commerce, of such a character that it is so inseparable from the remainder of the section that the part which attempts to regulate interstate commerce cannot be disregarded and the remainder allowed to stand.

And lastly: If the section is separable in character, can the Court say and should the Court say that the framer of the section would have so framed it and that the people of the State of California would have adopted it had they known that the part with respect to interstate commerce would fall and be of no effect?

Now, that, in brief, is the first federal question.

The second federal question is this: Giving the long and short haul provision of this section an inflexible effect, an effect which could not be disregarded by the Railroad Commission, as found by his Honor, Judge Van Fleet, on his ruling on demurrer in the Court below—I say, giving it that inflexible interpretation, or giving the interpretation of the amended section, an immediate and automatic operation upon the taking effect of the section, contended for by counsel, does that amount to a taking of property without due process of law?

As to the first proposition, if your Honor please, I think it is quite plain, from a reading of the section, page 4 of the brief of plaintiff in error, that the framer of the section did unquestionably attempt to control and regulate not only discrimination as between points in the State, but discrimination in the charges or facilities for the transportation of the same class of freight within this State or coming to it from or going from it to any other State. The expression could not be more aptly phrased. The framer of the section could not have more clearly evinced his intention to lay down a rule that a

railroad, as to California freight, either going to or coming from a point within this State, should not discriminate as between places and persons.

The first sentence of the section, it may be claimed by counsel, is separable from the second sentence of the section, which contains what is claimed to be an inflexible long and short haul clause, a clause which could not be and has not been legally, according to him, deviated from by either the Railroad Commission or by the carrier. And the second sentence reads:

> "Persons and property transported over any railroad or by any other transportation company or individual, shall be delivered at any station at charges not exceeding the charges for the transportation of property of the same class in the same direction to any more distant station."

Now, manifestly, the framer of the section had in mind in framing the section that he was reading into the law of the State something unknown to common law. The so-called long and short haul principle is merely another effort to prevent discrimination between persons and communities. That, I think, is familiar learning. Discrimination lies at the root of and furnishes the reason for the so-called long and short haul clause as we find it in the Interstate Commerce Act, and in the various states which have made it a part of their organic law or of their commission regulation; and it must be, I think, presumed that the framer of this section had in mind, in placing that in the Constitution, and

that the people had in mind, when they adopted the Constitution with that in it, that discrimination by means of charging more for a given service than for a more distant service was unknown to the common law.

Counsel says in his brief that there is a contrariety of opinion among the State Courts as to whether that particular form of discrimination was unknown to the common law. But, so far as California is concerned, the question is definitely settled by the case of *Cowden* vs. *Pacific Coast Steamship Company* 94 Cal. 470, in which the Court says:

> "A complaint in an action by a shipper against a carrier which substantially alleges that for the same quantity and character of freight the plaintiff was charged a greater amount for transportation from the same point than another merchant, and which does not allege that the charge to plaintiff was unreasonable and excessive, does not state a cause of action at common law, and an allegation of discrimination or inequality is not the equivalent of the allegation of an excessive charge."

The Court, in this opinion, cities a great many cases holding that under the common law a carrier was free to charge one man more than it did another for the same service, or charge one man less than it did another for a greater service, provided always that the charge made for the service performed was reasonable in and of itself. As I said in the beginning, there is no contention made here, no pleading and no evidence, to the effect that the

charges we actually collected were unreasonable in and of themselves.

If further authority is needed to the effect that discrimination as we know it in modern railroad law was unknown to the common law, your Honors will find it in a case cited in the brief, *Pennsylvania Railroad Co.* vs. *International Coal Co.,* 230 U. S. 284.

So there was read into and made a part of the Constitution, as I say, a principle unknown to the common law, a new declaration of policy by the State, and of rights and duties on the part of the carrier—taking the most extreme view of it.

How did the Constitution seek to vindicate this right? Not by giving any private right of action to the community or to the individual aggrieved, but by supplementing the section which contained this provision against discrimination by the following section, Section 22, on page 4 of the brief, which created a board of railroad commissioners, which gave them power to establish rates and charges for the transportation of passengers and freight by railroad or other transportation companies, and to publish the same; and which provided that any transportation company which failed to observe those rates, should be fined not exceeding $20,000 for each offense; and further providing that in all controversies, civil or criminal, the rates of fares and freights established by said commission shall be deemed conclusively just and reasonable, and in any action against such corporation or company for

damages sustained by charging excessive rates—manifestly rates in excess of those fixed by the commission—the plaintiff, in addition to actual damage, might recover exemplary damages; and the legislature was given power to pass all laws necessary to carry this section into effect.

It is a striking thing in this case that for more than 30 years after the enactment of that constitutional provision, we find the commission of the State of California, which continued in existence during that time, absolutely disregarding this so-called long and short haul clause which counsel would have the Court isolate from the remaining sections of the Constitution. We find the commission establishing rates not only as to this but as to all other carriers in entire disregard of that clause. We find the railroad companies disregarding the clause and collecting the rates established by the commission. And it remained for the gentlemen who organized the plaintiff to collect these thousands upon thousands of claims—I am not referring to counsel in this connection, however—I say it remained for those gentlemen to find out after 30 years that there had been a mistaken construction, acquiesced in by everyone, as to the effect of these two sections of the Constitution taken together.

It is true that the learned District Judge supported that theory by saying that the commissioners under these provisions of the Constitution, which he said were mandatory and prohibitory, had no power to fix rates in violation of the long and short haul

clause; and indeed, all of his rulings in the case proceeded upon that theory, that while we had collected rates which had been promulgated by the commission, which were a system of state-made rates,—that while, I say, we had collected those rates, and none others, that while those rates were not alleged in the case to be unreasonable in and of themselves, that while it was not alleged that the plaintiff had been damaged, except by way of argument that damage necessarily followed the allegations of the complaint, nevertheless we should, on the theory of an excessive charge, be compelled to refund to the shippers represented by the plaintiff below the amount of collections which had been made on the basis of tariffs which had been established and promulgated by the commission, and which, if we disobeyed, we were faced by prosecution and a possibly successful conviction and fine of not to exceed $20,000 for each disobedience.

The acquiescence, I say, is remarkable, and yet there is more to support the statement that it was generally believed that this section was unconstitutional. When the legislature came to propose an amendment to that section to the people at the election of October 10, 1911, it did so by consolidating the provisions of the section and removing what I deem absolutely to show that the old section was regarded as an attempt to regulate interstate commerce. It did so—page 6 of the brief—by saying that no discrimination in charges or facilities shall be made between places or persons for the transportation of the same classes of freight or passengers

within this State,—dropping out the words, "coming from or going to any other State."

It then provided a general long and short haul clause, but annexed to that a provision that upon application to the Railroad Commission provided for in this Constitution, the company might, in special cases, after investigation, be authorized by such commission to charge less for longer than for shorter distances.

So that it would appear, taking the amended Section 21 of Article 12 as an entirety, that the legislature, itself, and the people, presumably, in adopting the amendment, saw that the old Section 21 was, as we claim, invalid on its face.

This very point, this enforcement of the long and short haul clause of the old Section 21 of Article 12 of the Constitution, was considered by the Railroad Commission of California in a case entitled, *Scott, Magner & Miller* vs. *Western Pacific Railroad Company,* reported in the second printed volume of the Opinions and Decisions of the California Railroad Commission, beginning at page 626. The commission, after an elaborate discussion, says:

> "We are convinced that if the Railroad Commission had established the rates in controversy here, there could have been no right to reparation except for the collection of rates charged in excess of those so established, up to October 10, 1911. We are somewhat uncertain as to the effect which the failure of the Railroad Commission to establish the rate affected as the

> right to reparation, but have reached the conclusion that the system of state-made rates established by the Constitution of 1879 could not have contemplated a right to reparation except in case the carrier charged a rate in excess of that established by the commission. In a scheme providing that the State itself establishes rates which shall be conclusively just and reasonable, there is no room for the doctrine of reparation except as indicated. The fact that the commission may have failed in its duty cannot change the law or create a new system."

And then, on page 638, they say that the commission had theretofore decided several reparation cases without giving the matter full study, but that this represented their mature thought on the subject, and that these were given as the final views of the commission up to that time.

This decision was concurred in by all of the commissioners, among whom were Mr. Eshleman, the author of the Eshleman Act in 1910, and Mr. Thelen, the author of the present California Public Utilities Act, and who is now chairman of the commission, and, I think, can safely be said to represent the mature deliberate judgment of the commission.

Now, I have not time to take up with the Court, in this oral argument, the argument as to whether if this section does attempt on its face to regulate interstate commerce, the provisions are so inseparable as to render the whole section void, and whether if, by any possibility, they might be separated, the Court could say even then that they would

have been adopted if it were known that part of them were invalid and part valid.

But, perhaps, in the mind of the Court, as there was in my mind when I came to study this case somewhat, there arises the question: how does this interfere with interstate commerce, even if it is to be given our application?

Let us take, if your Honors please, the road from San Francisco to Portland, Oregon, a road passing from within the limits of California to within the limits of Oregon, and between the termini of which there is an actual competition by water, a competition which has been recognized by the Interstate Commerce Commission in the fourth section cases affecting traffic on that line by establishing a 51-cent rate per hundred pounds from San Francisco to Portland, and by establishing a maximum interstate rate from San Francisco to points in Oregon of $1.50 per hundred pounds. Let us suppose that you take that schedule of rates established by the Interstate Commerce Commission, pursuant to their authority under the fourth section, and superimpose on that this hard-and-fast long and short haul rule contended for by counsel here, what would be the result? The railroad company could not charge to any point within the limits of California any more than 51 cents per hundred pounds, the through rate from San Francisco to Portland. It might be charging across the line in Oregon the maximum of $1.50 permitted by the Interstate Commerce Commission's order. The thought may occur

to the Court, how, then, would that affect interstate commerce? Well, let us suppose that there are two business enterprises, jobbing houses, we will say, on either side of the California-Oregon line; under the interstate rate, the Oregon shipper is compelled to pay $1.30, $1.31 or $1.32 per hundred pounds. Under the effect of this so-called inflexible long and short haul rule, the California jobber, on the other side of the line, has his rate measured by the 51-cent water-controlled Portland rate as to which the Interstate Commerce Commission says in the Portland case, 22 Interstate Commerce Reports, page 375, "A railroad is justified under the law in discriminating in favor of one city against another if they are so differently circumstanced that at one point transportation forces are brought into play which are not or cannot be exercised at another point; but a carrier is not justified in deliberately adopting a policy of preference; only the preference or advantage that is due is justified, and that advantage which is bestowed upon a city by the simple policy of the carrier, and not by reason of actual difference in conditions is undue."

This situation was very aptly illustrated by the United States Supreme Court in a case which arose before the Interstate Commerce Act was adopted, the case of *Wabash, St. Louis & Pacific Railroad Co.* vs. *Illinois,* decided October 25, 1886, reported in 118 U. S. 557. In that case the State of Illinois enacted that if a railroad corporation shall charge, collect or receive for the transportation of freight for any distance within this State the same or a

greater amount of toll or compensation than at the same time was charged, collected or received for the transportation in the same direction of any passenger or like quantity of freight of the same class over a greater distance of the same road, that that should be deemed prima facie evidence of unlawful discrimination and the party may recover three times the amount of the damages, and so on. The Court said that if the Illinois statute could be construed as applying exclusively to contracts for a carriage beginning and ending within the State, there seemed to be no difficulty in holding it valid; but at the latter end of the decision, the Court states:

> "Let us see precisely what is the degree of interference with the transportation of property or persons from one state to another, which this statute proposes."

I do not propose to take up the time of the Court in reading this decision at length, as I intend to file a copy of the reporter's notes, at least, but I desire to commend to the Court as an exact illustration of the imposition of this so-called long and short haul on a water-compelled condition, the language of the Court in the concluding portion of the decision in the 118 U. S. to which I have just referred.

NOTE: See also *L. & N. Ry.* vs. *Eubank,* 184 U. S. 27.

In the brief, your Honors will find authority on the question of separability and on the somewhat more important question in the case whether this

Court can say and should say that the section would have been adopted if it were not for these provisions.

Now, we come to the proposition of the effect of the amendment to these sections adopted on October 10, 1911. I am purposely passing over the argument addressed to the point that the section is unconstitutional as an inflexible operation because it deprives the carrier of property without due process of law; that, I think, can better be treated and worked out in a brief, as we have endeavored to do.

On October 10, 1911, the section was amended. I have already read the substance of the amendment. Section 21 was amended to re-establish the commission, and to provide:

> "No provision of this Constitution shall be construed as a limitation upon the authority of the legislature to confer upon the Railroad Commission additional powers of the same kind or different from those conferred herein which are not inconsistent with the powers conferred upon the Railroad Commission in this Constitution, and the authority of this legislature to confer such additional powers is expressly declared to be plenary and unlimited by any provision of this Constitution."

In an opinion written by Mr. Justice Henshaw, and concurred in as to that portion of it by the other Justices of the California Supreme Court, there was decided the case of *Pacific Telephone & Telegraph Company* vs. *Eshleman,* 166 Cal. 240. Mr. Justice Henshaw, in a trenchant way, calls

attention to the fact that that clause of the amended Section 22 is equivalent to placing the acts of the California legislature with respect to the Railroad Commission in the same situation as acts of parliament, and that they may override, in so far as they are not inconsistent with the provisions of the section,—they may override any other section of the Constitution. That was said in connection with whether the writ of review section of the commission act encroached upon the judicial power of the State. The amended Section 22, however, goes on to say:

> "That the Railroad Commission Act of this State"—that is the Eshleman Act of 1910—"shall be construed with reference to this constitutional provision and any other constitutional provision becoming operative concurrently therewith and shall have the same force and effect as if it had been passed after the adoption of this provision of the Constitution."

The Eshleman Act took effect in February, 1910, and there for the first time we find either in the Statutes or the Constitution of California, a right of action prescribed arising out of the violation of this so-called long and short haul clause. The Eshleman Act was expressly continued in force and made a part of these amended provisions of the Constitution. It stated that the penalty for a violation of the constitutional provision relating to rates and fares should be a suit by the State to recover the penalty, thus—as we argue in the brief—definitely negativing the idea that it was in the

mind of the legislature that any private right of action should arise.

But in the course of the trial in the Court below, we endeavored to prove that irrespective of federal questions in the case which we have raised by separate defenses, by a motion for a non-suit and by an effort to introduce evidence the defendant below had been relieved by the Railroad Commission after October 10, 1911. We offered in evidence a chain of orders of the Railroad Commission. The first order was dated October 26, 1911, and ordered all carriers to come in and present a list of deviations, if they desired to make such deviations from the long and short haul principle of the Constitution. The second order was dated November 20, 1911, and gave permission in terms to the carriers who did so come in to continue the deviations then existing until the commission could finally pass upon and determine them. The carriers filed those applications; the applications which cover the rates involved in the case at bar were filed on December 30, 1911. On January 7, 1912, an investigation was begun which was not completed, but the commission, following that incomplete formal hearing and investigation, entered an order of February 16, 1912, again relieving all carriers who had filed applications from the operation of the provisions of the long and short haul clause until the commission might have the opportunity of further passing upon and determining the matter.

It was held by his Honor, Judge Van Fleet, that under the language of Section 22 of Article 12 as

amended October 10, 1911, there must be, before relief could be obtained an application filed by the carrier, and an investigation made by the commission. And this investigation, apparently, from his rulings in the case, he took to be such an investigation as might be denominated due process of law —a formal investigation, notice and hearing, and opportunity to produce witnesses and be heard, and all the concomitants of the generally-understood definition of due process of law. Since his ruling in that matter—and I may say that he declined to admit in evidence all of this chain of orders and applications—I say since his ruling in that matter, the Railroad Commission of California so lately as yesterday handed down a decision in which it states what its construction of that chain of orders amounts to, and what its construction of the word "investigation" is. I submit that, while of course the decision of the Railroad Commission has not the same binding force on a pure question of law that the decision of the California Supreme Court might be given by your Honors, nevertheless, being an expert tribunal, being constantly in touch with all of these questions and knowing, if anyone knows, what its orders meant and were intended to be, its opinion should at least be entitled to some weight in considering what it intended to have those orders affect. The decision I refer to is decision No. 2884 of the California Railroad Commission, handed down November 8, 1915, in the case of *Fresno Traffic Association* vs. *Southern Pacific Company.* The opinion is concurred in by all of the commisioners.

(NOTE: A printed copy is appended.)

In this case, the Fresno Traffic Association claimed that there never had been any relief from the prohibition of the amended section of the Constitution as respected the long and short haul clause, because the commission had never completed the formal proceeding instituted by it, which involved the thousands upon thousands of rates within California. After reciting the chain of orders which were offered in evidence in this case in the Court below and refused admission, the commission says:

> "Previous to said order of February 15, 1912, an extended investigation was made by the Rate Department of the commission, under the commission's instructions and supervision, with reference to the deviations from the long and short haul clause, on the part of the carriers, including the defendants herein as shown by said petitions.
>
> "The evidence in this proceeding shows clearly that the investigations thus conducted by the Rate Department were extended and exhaustive, and that frequent conferences on this subject were held, as the investigation proceeded, between the commission and its Rate Department, prior to the order of February 15, 1912. This investigation, as shown by the evidence herein, covered not merely the general subject, but also was specifically directed to the individual deviations shown in the petitions of the carriers."

The commission then holds that as it has, after investigation, authorized the carriers pending the further order of the commission to continue the

deviations from the long and short haul clause herein involved, and as the question of the violation of the long and short haul clause is the sole basis of the claim for reparation herein, the complaint should be dismissed.

The case involved in this opinion of the commission which I have just read differs in no respect whatever from the claims involved in the case at bar, which arose after December 30, 1911, the date when the carriers filed application to be relieved from the operation of the long and short haul clause as respected the rates involved in this case.

As to the claims of the defendant in error which arose between October 10, 1911, and December 30, 1911, they are not involved in the decision of the commission, and the decision therefore as to them has only what authority it may have by way of illustration.

I feel that I have already, perhaps, taxed your Honors' patience with merely a few angles of an exceedingly intricate, novel and interesting litigation, as well as an important one to the carriers; we have tried to treat the federal questions fully in the brief, and in addition to that, we have raised certain state questions, such as that the remedy for the enforcement of the constitutional provision is a remedy given by the legislature to the State, and not to an individual; such as the question that the statutes nowhere confer upon the individual a right of action; also the question that it was necessary in this case for the plaintiff to have pleaded and proven

an actual suffering of damages; and the final question, and one which is of exceeding importance, that the plaintiff below should first have applied to the Railroad Commission of the state of California for a reparation order.

As I said in the beginning of the argument, if at the conclusion of counsel's argument the court will see fit to permit me to file a short brief answering whatever authorities he has cited in his brief, which I have not been able to review in the time which has elapsed since the briefs were served, I will appreciate it greatly, and I think that the importance of the case is one that may fairly be said to require it.

I would like to file copies of the opinion of the Railroad Commission last referred to.

I thank your Honors.

Mr. Harwood: May it please your Honors: as counsel for plaintiff in error has referred to but few of the points in the case I will confine my reply merely to the points referred to by him.

The first statement made by counsel was that the complaint did not state that the defendant in error was damaged. If your Honors please, this action is sustainable on two grounds; first, that it is an overcharge, that the charges collected from plaintiff's assignors were overcharges; it is sustainable on the common law theory of an action for overcharge. It is also sustainable, as pointed out in the brief, on the theory that it is an action for damages under the various statutes which were in effect at the

time this action was commenced, the Statute of 1909, the Statute of 1911 and the present Public Utilities Act. It is true that the actual word "damage" is not mentioned in the complaint but facts are stated from which the damage will be conclusively presumed. Therefore the action is an action for damages as well as an action for overcharge. It is also a statutory action under the statutes to recover damages.

Counsel took considerable time on the point that this constitutional provision as it existed prior to the amendment in 1911 is on its face an attempt to interfere with interstate commerce and is a federal question. There is no federal question involved here. It is merely a question of the construction of the section. All the shipments in this case moved in California; the long and short haul point is in California—the long haul point is in California and the short haul point is in California. In no sense is there any question of interstate commerce involved in the case. This is not like the case of *Wabash* vs. *Illinois,* where the Illinois Supreme Court attempted to give an act similar to ours a construction whereby upon a rate in the State of Illinois would be based upon a haul out of Illinois. In other words, the Supreme Court of Illinois in that particular case construed the long and short haul clause of the interstate commerce act involved to mean that the railroad company could not charge for a haul within Illinois a greater rate than it charged in the same direction for a longer distance to some long haul point outside the State of Illinois. That is undoubtedly an interfer-

ence with interstate commerce because it based the state rates upon the rates to a point outside of the state. The Supreme Court held in that case that the act so construed was violative of the federal constitution as an interference with interstate commerce. But at the same time, if your Honors please, the Supreme Court of the United States in that case said that they saw no reason why the Supreme Court of Illinois hould have construed the act so as to include such a shipment. The Supreme Court said:

> "It might have been a question whether the statute of Illinois now under consideration was designed by its framers to affect any other class of transportation than that which begins and ends within the limits of the State."

In this case, if your Honors please, the transportation began and the transportation ended within the limits of the state. The long haul points upon which are predicted the rates to the intermediate points are within the State of California. There is no transportation involved in this case outside of the state. The question raised by counsel is simply a question of the construction of this section of the constitution; it is not a federal question at all.

The matter of the construction of that provision is fully covered in the brief filed by plaintiff in error; I do not think it will be necessary to discuss that matter in detail here.

The long and short haul clause I will read to your Honors:

> "Persons and property transported over "any railroad or by any transportation com- "pany or individual shall be delivered to any "station, landing or port for charges not ex- "ceeding the charges for transportation of "persons and property of the same class in "the same direction to any more distant sta- "tion, port or landing."

That can be given full effect by limiting it to shipments within the State of California. Those are the only shipments which the people of the State of California had any right to legislate upon. But counsel for plaintiff in error desires to construe the act for the purpose of holding it contrary to the federal constitution in a case where interstate commerce was in no sense involved, as was in the Wabash case.

Counsel has said that the people of the State of California, if they had known that this alleged interference with interstate commerce was involved might not have passed the section, might not have prevented discrimination. It seems to me that that mere statement upon its face cannot be sustained because the people of California desired to prevent discrimination. Possibly in the first section of the statute they went beyond their rights in trying to prevent it in shipments coming from or going to any other state but certainly that provision can be separated from the others. What reason is there to say that because the people in California did not wish to prevent discrimination in California the contrary would be the case, that they desired to

prevent discrimination everywhere. It seems to me that when they passed an enactment to the effect that there should be no discrimination in California and also interstate commerce which came into and went out of California that the invalid portion of that section can be separated from the valid portion and it will be presumed that the people of California desired to prevent discrimination wherever they could prevent it; in other words, they attempt by the first section—Section 21 of Article XII, to prevent discrimination in interstate commerce coming to or going from California, but the second section, which is the long and short haul clause, makes no reference to any point outside of California. Standing by itself and if it were the only section in the constitution it could not possibly be subject to the objection made by the plaintiff in error in this case because there is no reference made to any interstate commerce. On its face it does not apply to any commerce, but commerce beginning and ending in the State of California.

Counsel has referred to the penalty which is provided for in Section 22, Article XII of the constitution. There seems to be an argument made more or less to the effect that as this right to have property transported the shorter distance for charges not exceeding those for the longer distance did not exist at common law; that when the people enacted such a provision and in the same constitution provided a penalty for a violation of the constitution, that the penalty is exclusive. That seemed to be the argument made by counsel. Now, if your Honor

please, the rule as gleaned from a reading of the authorities on this subject is this: that where something is forbidden by a statute which is not actionable at the common law and a penalty is provided therefor, the penalty is exclusive except where the statute has vested a right of property in an individual and where the doing of the act prohibited impairs the property right so vested.

In all those cases, although a penalty may be enacted, the penalty is not exclusive, and the right of property can be asserted by the ordinary common law right of action. The authorities to that effect—

Judge Ross: Just read that over again, please.

Mr. Harwood: Where something is forbidden by statute which is not actionable at common law and a penalty is provided therefor by the statute the penalty is exclusive except where the statute has vested a right of property in an individual and where the doing of the act prohibited impairs the property right so vested.

Judge Ross: Had any statute or any provision of the constitution vested any such right in the individual?

Mr. Harwood: The right of property is vested by ~~the reading of~~ this provision: Persons and property transported over any railroad, or by any other transportation company or individual, shall be delivered at any station, landing or port at charges not exceeding the charges for the transportation of persons and property of the same class in the same

direction to any more distant station, port or landing. That, if your Honors please, vests in all persons in California the right of property—a property right—to have their property transported by common carriers at rates not exceeding the charges for the longer haul. The authorities in support of the rule that I have stated are *Barden* vs. *Crocker,* 27 Mass., 383; *Bickford* vs. *Hood,* 7 T. R. 620; *State* vs. *Poulterer,* 16 Cal., 525; *Attorney General* vs. *White,* 2 ~~Commons~~ Comyns, 433.

Judge Gilbert: Are those authorities cited in your brief?

Mr. Harwood: No, your Honor, they are not. I desire to say that that point was not made in counsel's brief. And, your Honors, I received their brief only ten days ago and I have had to prepare my brief rather hurriedly.

Counsel refers to actions brought by the plaintiff in this case. The fact is that there are many hundreds of actions pending in the State of California in which the plaintiff is not a party. In a great many of those actions the suits have been commenced in the Justices' Courts and judgment rendered in favor of the plaintiff. The plaintiff in error here has paid those judgments without appealing to the Superior Court. A great many other actions are still pending with which this plaintiff has no connection at all.

Counsel has referred to the Eshleman Act and to the provisions of the constitution as amended to the effect that no provision of this constitution shall

be construed as a limitation upon the authority of the legislature to confer upon the Railroad Commission additional powers of the same or different kind from those conferred herein which are not inconsistent with the powers conferred upon the Railroad Commission by this constitution; and the authority of the legislature to confer such additional power is expressly declared to be plenary and unlimited by any provision of this constitution. Counsel has not stated the purpose of making this reference. There is no claim made that the legislature has in any way passed an act which after the amendment to the constitution or before the amendment in any way impairs or changes or modifies the long and short haul clause of the constitution as amended on October 10, 1911, and which provides that it is unlawful to charge more for the shorter haul than for the long haul until upon investigation and in special cases the Railroad Commission has given the right to so charge. No act of the legislature has been cited by counsel, and there is no act which in any way changes or attempts to change that provision of the Constitution. But even if an act of the legislature had been enacted which attempts to change that provision it would be unconstitutional because although the legislature, as held by the Supreme Court of this State in the Telephone case in passing acts and conferring powers upon the commission may disregard the constitutional provisions, such as the constitutional provision of this state that private property shall not be taken or damaged without compensation first being made.

And although the legislature may in conferring powers on the commission ignore that and may enact that the commission may take private property without compensation first being made, yet there is nothing in this constitution which would in any way give the legislature the power to in any way change or modify any of the provisions of the California Constitution insofar as they relate to the Railroad Commission or to the subject of common carriers.

That was expressly recognized by the Supreme Court of California in the Telephone case. They can ignore other provisions of the constitution, but they are bound by the provision of the constitution relating to common carriers and the Railroad Commission; they are not empowered to enact any legislation which is in any wise inconsistent with Sections 21 and 22 of Article XII of the Constitution of California.

However, the question is rather unnecessary here because there is no attempt made to show that the legislature has made any attempt to change this constitutional provision.

Counsel has referred to the so-called orders granting relief after the amendment to the constitution. Now, if your Honors please, in the brief of plaintiff in error, no attempt was made to claim that the commission had granted relief. However, there seems to be rather a change of attitude at the present time.

If your Honors please, I will first refer to the seventh further and separate defense to which this evidence which counsel refers to is pertinent:

> "For a seventh further and separate de-
> "fense, defendant states that as to each and
> "all of the shipments referred to in plaintiff's
> "separately stated causes of action, which moved
> "or were delivered after October 10, 1911, the
> "Railroad Commission of the State of Califor-
> "nia, pursuant to Section 21, Article XII, Cali-
> "fornia Constitution, as amended October 10,
> "1911, authorized defendant, after investigation,
> "to charge more for the shorter distance to the
> "point intermediate San Francisco and Los An-
> "geles to which such shipment was transported
> "than for the longer distance in the same di-
> "rection."

Pursuant to this seventh separate defense, the demurrer to which was overruled by the trial court, counsel attempted to introduce these so-called orders of the Railroad Commission. This is the contention made in the brief by counsel for plaintiff in error: it is their contention that these orders which were offered in evidence showed that the commission did pursuant to the power given it by the Eshleman Act, Section 15, to fix rates, actually made a series of orders, some of them preceding the filing of the petition for relief from the long and short haul clause and some of them afterwards, but all of them with the intention of preserving the status of rates then being charged by plaintiff in error until it could be determined by the commission whether and if so to what extent it was entitled to relief. No contention is made that the relief was granted.

If your Honors please, I do not believe it necessary to refer to that matter in the argument because

the orders and the admissions made at the trial are all fully set forth in the brief of the defendant in error.

Referring to the order of February 15, 1912—and I will only refer to one—being referred to in the last minute opinion of the Railroad Commission which has been cited here, and of which I was not aware until it was called to my attention by counsel at this hearing, it having been rendered yesterday I believe, according to the copy furnished—the order reads this way:

> "Until February 15, 1912, the railroad and "other transportation companies may file for "establishment with the Commission in the man- "ner prescribed by law and in accordance with "the Commission's regulations such changes in "rates and fares as would occur in the ordinary "course of their business, continuing, under the "present rate bases or adjustments, higher rates "or fares at intermediate points: Provided that "in so doing the discrimination against inter- "mediate points is not made greater than that in "existence October 10, 1911, except when a "longer line or route desires to reduce rates "or fares to the most distant point for the pur- "pose of meeting by a direct haul reduction of "rates or fares made by the shorter line. The "Commission does not hereby indicate that it "will finally approve any rates and fares that "may be filed under this permission or concede "the reasonableness of any higher rates to in- "termediate points, all of which rates and fares "will be subject to investigation and correction."

That was the order made on February 15, in which the Railroad Commission, according to the opinion which it rendered yesterday, now says they intended to be an order of relief.

Judge Ross: Let me ask you this. I want to see if I can understand this case: the people in attempting to prevent discrimination must act through some agency; in this instance it is up to the Railroad Commission to prevent discrimination. The real question in this case then is whether this section of the statute which you have just read in regard to these private parties having a right to recover if they are charged too much should prevail over that provision creating this public agency to prevent discrimination?

Mr. Harwood: I don't know that I quite follow your Honor's question. The Commission is empowered to prevent certain kinds of discrimination.

Judge Ross: No private party can prevent discrimination. As I understand it, you have organized a corporation to take assignments from people who claim they have been charged too much for the transportation of their products.

Mr. Harwood: The plaintiff in this case is composed of parties who themselves primarily ~~have~~ had been overcharged and who desired to have others co-operate with them.

Judge Ross: Yes, an assignment from those people who claim they have been charged too much for the transportation of their goods.

Mr. Harwood: Yes, your Honor, this action is on ~~an~~ assigned claims.

Judge Ross: Then the real question is whether the statute which you read awhile ago gives to your assignors a right which is paramount to the rights which the Railroad Commission exercises.

Mr. Harwood: In a way it is, your Honor, and also whether or not those rights which are measured and given by the constitution can be ignored by any order of the Railroad Commission. This is a case, if your Honors please, where it is not necessary to obtain a reparation order; it is a case similar in principle to the case of *Pennsylvania Railroad Co.* vs. *International Coal Co.,* where the United States Supreme Court held that the party damaged could seek his remedy in court without going to the Commission for the reason that discrimination in that case, as in this case, was apparent from the mere doing of the act; it was not necessary that there should be any rate-making question determined in advance to determine whether there was a discrimination, as in some of the other cases, for instance, as in the Abilene Coal Company case, or the case in 222 U. S., where the plaintiff alleged that he was charged more for his coal because it was loaded from wagons than other people were charged because their coal was loaded into cars from tipples; he was charged 50 cents per ton more; in that case the higher rate charged was according to the tariff; in other words, the tariff said, when loaded from wagons the rate is 50 cents higher for coal than when

loaded from tipples. The plaintiff commenced an action to recover. The Supreme Court of the United States held that that was a matter which was proper for the Commission to first pass upon before he could maintain his action in the cause because it was a question of discrimination in tariffs which the Interstate Commerce Commission should first pass upon and determine whether or not that was a reasonable difference.

Judge Ross: Does not that principle apply here?

Mr. Harwood: No, your Honor, that principle does not apply here. The principle that applies here is the principle laid down in *Pennsylvania* vs. *International Coal Co.,* where the plaintiff in that case was charged a lawful rate; other persons were charged less than the lawful rate, because they had contracted for their coal some year or two before, under the old rate, and believed that the railroad company could give them the benefit of a lower rate, lower than the tariff rate. The plaintiff in that case, who knew all along that these other people had been obtaining those rates, and who nevertheless paid the rates mentioned in the tariff, commenced an action in the court to recover the damages sustained by the unlawful act of the carrier in according the lower rate to the other shippers.

They did not go to the Commission. The Supreme Court has held that it was not necessary to go to the Commission because the very doing of the act was unlawful, that there was no rate-making question involved and therefore it was not incumbent upon

the plaintiff to get any determination from the ~~Railroad~~ Commission because the ~~Railroad~~ Commission could not determine that the act was reasonable because it was in direct conflict with the statute. So in this case the charging of more for the short than for the long haul is in direct conflict with the constitutional provision. The case is identical in principle with the International Coal Company case insofar as the jurisdiction of the court and of the Railroad Commission is concerned.

Now, if your Honors please, I will close my argument with a further reference to the orders made by the Railroad Commission which it is now contended by counsel for plaintiff in error allow the carrier to charge more for the shorter haul. This application was filed on the 30th of December, 1911—the application for relief. On the 2nd of January a meeting of the Railroad Commission was held. With reference to this meeting it was admitted at the trial of the case that a discussion was held but no evidence was introduced, nothing further was done, it was postponed without day. The minutes of the meeting were introduced in evidence which showed that no action was taken.

With reference to the petitions themselves this admission was made:

> "These petitions may be considered to have "been pending until May 27, 1912; they had "not been specifically acted upon either prior to "that time or since that time except insofar "as the decision in case 116, which I am going

"to offer shortly, may be considered to have "affected them."

These causes of action all arose prior to May 27, 1912. The decision in case 116 did not take effect until May 27, 1912. So we have the admission here, in addition to the orders themselves, which shows that these petitions for relief were still pending during all the time that these charges were made, the last charge having been made prior to May 27, 1912.

If your Honors please, I do not know just how to characterize this last minute opinion of the Railroad Commission. It is evidently an attempt on their part to in some way bolster up their orders which were made at that time and which were made confessedly under an entire misapprehension of what the law was. The Railroad Commission of this state has reached in the Scott, Magner and Miller case the erroneous conclusion that they had the right to establish rates prior to October 10, 1911, which violated the long and short haul clause of the Constitution of California and in their decision absolutely ignore the authorities of the Supreme Court of this state which state the effect of a constitutional provision upon the legislature, upon the commission and upon everyone. And, if your Honors please, I will conclude my argument ~~with~~ by reading an extract from the decision of the Supreme Court in the matter of Maguire, 57 Cal. 607, which was decided after the Constitution of 1879 went into effect:

(Counsel then read at length from 57 Cal. 607.)

Counsel continued:

And so in this case, if your Honors please, the command of the highest sovereignty in this state with reference to rates requires that there shall be no higher charge for a short distance than for a longer distance over the same line and in the same direction, and neither the legislature nor the commission nor the carrier can lawfully charge more for the short than for the long haul.

Mr. Booth: I would like to call the attention of the Court to one matter: It seems to me that the reference by counsel to the decision in the International Coal Company case drawn out by a question from his Honor, Judge Ross, is rather unfortunate for him. In the International Coal Case, a man who had paid the lawful rate sued for damages on the basis of others having been charged a lesser rate for the same commodity, for the same service; in other words, those who received a secret rebate—

Mr. Harwood: There was no secret in that case.

Mr. Booth: It was not a secret to the plaintiff. I don't believe, though, they published it in the papers, or anything of that sort. Mr. Justice Lamar, speaking on the right of the plaintiff to recover, bases that right solely upon the provisions of the interstate commerce act, which gives a man who has been injured by a violation of the provisions of the act, Section 3, for instance, prohibiting discrimination, the right of action to recover damages for such discrimination. If we place this case on the same basis as the International Coal case, as counsel seems to think should be done, counsel brings himself squarely

up against the language of Mr. Justice Lamar when he says that before any party can recover under the act he must show not merely the wrong of the carrier, but that that wrong has, in fact, operated to his injury.

Then the Justice discusses the cases which were recited against the principle that damage need not be shown in a case of that kind. After citing a long list of cases, he says, on page 898 of the 33rd Supreme Court Reporter: "Those cases relied upon by plaintiff do not support the proposition that damages can be recovered without proof of what pecuniary loss has been suffered as a result of discrimination."

Judge Rudkin: Suppose the legislature of California had prescribed $1 per hundred from here to Los Angeles and you charged $2 per hundred, could not the party recover it back?

Mr. Booth: Assuming that the rate was proper, and accompanied by due process.

Judge Rudkin: That is practically what the constitution does in this case, and that is what the other side claims.

Mr. Booth: Yes, sir. If, in fact, the rates contended for here were in excess of the lawful rate, we do not claim that an action for overcharge cannot be maintained; but we claim that to take the isolated section of the constitution, select it out of the body of the constitution, as contended for by counsel and give it counsel's construction, is to utterly

disregard the other section of the constitution, equally as mandatory and equally as prohibitory as that section. So far as there being no attempt by the commission to fix these rates after October 10, 1911, counsel, I think, misundertands our position in that regard. The amended section of the constitution expressly says that the Eshleman act—the then Railroad Commission act passed in 1910—shall be construed as though it had been passed after the adoption of the amended section—a remarkable example of a constitutional section, so to speak, swallowing a statute whole. That is explained in the briefs. There is a contemporary history which explains why they did that, why the constitution was so framed. At any rate, it was done. The Supreme Court of California has said that it is competent for the legislature to pass any section not inconsistent, and so forth. The long and short haul clause is contained in the constitution adopted October 10, 1911, together with the other two provisions, that the commission may establish rates, and so on. According to the rule of construction laid down by the constitution, itself, we must construe the Eshleman act as though it had been passed after the adoption of the constitution. The Eshleman act says that the commission may establish rates. Suppose on October 10, 1911, a new railroad had been opened up and it became necessary, of course, under the statutes, for that railroad to have rates on file, a published tariff rate available to everyone and observable by everyone; suppose that a new railroad had come to the commission and said, "We want you

to establish rates." Unquestionably, under the Eshleman act, they would have had the power to establish the rates. Suppose they had established those rates without having a hearing, or taking evidence on the long and short haul question? The Ehsleman act permits them to do that. I have called attention to the section in the brief. I think it would not be available as a defense, either by the carrier or as a ground of action by a party-litigant to say that those rates were not legal rates because the long and short haul section had not been subjected to an application by the carrier for permission to deviate, and a hearing, and due process of law, and all of it concomitants, by the commission. That is the point I was making. The other points I shall try to cover in my brief.

(Copy of Decision No. 2884.)

BEFORE THE RAILROAD COMMISSION OF THE STATE OF CALIFORNIA.

Case No. 878.

FRESNO TRAFFIC ASSOCIATION, a corporation,

Complainant,

vs.

SOUTHERN PACIFIC COMPANY, et al., a corporation,

Defendants.

M. K. Harris and F. M. Hill, for Fresno Traffic Association;
C. W. Durbrow for Southern Pacific Company;
E. W. Camp for Atchison, Topeka & Santa Fe Railway Company.

Loveland, Commissioner:

Opinion

In this complaint reparation is asked under the provisions of the Constitution of California and the Public Utilities Act, for charging a greater sum for a short haul than for a long haul when both hauls are in the same direction and over the same rails.

The complaint alleges that certain shipments were made by certain business firms, members of the Fresno Traffic Association, complainant, over the

rails of the defendant carriers from San Francisco to Fresno, upon which a rate, violative of the provisions of the long and short haul clause of the Constitution and of the Public Utilities Act, was charged and collected. These shipments are set forth in the complaint as follows:

On the 24th day of August, 1914, shipment by the Western Sugar Refining Company, San Francisco, via Southern Pacific Company to the San Joaquin Grocery Company, Fresno, California, of sugar weighing 55,550 lbs., on which the rate of 25 cents per hundred pounds was charged, total amounting to $138.88, whereas complainant claims rate of 22½ cents, being the rate from San Francisco to Los Angeles, should have been charged and collected.

On the 30th day of March, 1914, shipment by the Western Sugar Refining Company, San Francisco, via Southern Pacific Company to the San Joaquin Grocery Company, Fresno, California, of sugar weighing 51,493 lbs., on which the rate of 25 cents per hundred pounds was charged, total amounting to $128.73, whereas complainant claims rate of 22½ cents, being the rate from San Francisco to Los Angeles, should have been charged and collected.

On the 15th day of September, 1914, shipment by the A. S. Company, San Francisco, via Atchison, Topeka & Santa Fe Railway Company to the San Joaquin Grocery Company, Fresno, California, of canned fish (sardines) weighing 40,880 lbs., on which the rate of 27½ cents per hundred pounds was charged, total amounting to $112.42, whereas com-

plainant claims rate of 22½ cents, being the rate from San Francisco to Los Angeles, should have been charged and collected.

On the 26th day of May, 1915, the Luckenbach S. S. Company delivered to the Southern Pacific Company at San Francisco, consigned to the Inland Iron Company at Fresno, California, a shipment of horse shoes and calks weighing 50,400 lbs., on which the rate of 31 cents per hundred lbs. was charged, total amounting to $156.24, whereas complainant claims rate of 27½ cents, being the rate from San Francisco to Los Angeles, should have been charged and collected.

On the 21st day of March, 1914, the Inland Iron Company, San Francisco, caused to be delivered to the Southern Pacific Company, consigned to the Inland Iron Company, Fresno, California, a shipment of angle, hoop and bar iron, weighing 84,400 lbs., on which the rate of 31 cents per hundred pounds was charged, total amounting to $261.64, whereas complainant claims rate of 27½ cents, being rate from San Francisco to Los Angeles, should have been charged and collected.

On the 13th day of August, 1915, shipment by the Pacific Coast Steel Company, South San Francisco, via Southern Pacific Company, to the Inland Iron Company at Fresno, California, of steel bars, weighing 70,870 lbs., on which the rate of 31 cents per hundred pounds was charged, total amounting to $219.70, whereas complainant claims the rate of 15 cents, being the rate from South San Francisco to

Los Angeles, should have been charged and collected.

The complaint further alleges that the defendant carriers "have not been authorized by the Railroad Commission of the State of California to charge less for the transportation of shipments of the character specified in the complainant's petition for a longer distance than for a shorter distance, and that said railroad commission has never, after investigation, authorized defendants by any order to charge less for transporting shipments over said longer distance than over said shorter distance, and has never, after investigation, granted any application of defendants, or either of them, to be relieved from the provisions of the Constitution of the State of California, forbidding railroads to charge less for hauling shipments over longer than over shorter distances"; and prays for judgment against defendant carriers in the sum of $207.76 and for interest on each excessive charge alleged to have been made by defendants at the rate of 7% from date of payment.

At the hearing it was agreed by counsel for defendant carriers that the statement of Mr. F. M. Hill, manager of complainant, would be accepted that the said shipments were made and that claims for reparation upon said shipments were assigned to complainant. The sole question, therefore, to be decided in this proceeding is whether the carriers violated the provisions of the long and short haul clause of the Constitution and Public Utilities Act in as-

sessing and collecting higher rates on said shipments between San Francisco and Fresno than the carriers collected on similar shipments between San Francisco and Los Angeles, or whether any action taken by the Railroad Commission of the State of California, hereinafter designated as the Commission, relieved the defendant carriers from the obligation of observing the long and short haul provisions on said shipments.

To set forth clearly the grounds upon which the decision in this case is based, a history of such action as has been taken by this commission, with reference to the long and short haul clause, follows:

Section 21 of Article XII of the Constitution of 1879 of this State contained a long and short haul clause. On October 10, 1911, this section was amended so as to provide that "upon application to the Railroad Commission provided for in this Constitution, such company may, *in special cases, after investigation,* be authorized by such commission to charge less for longer than for shorter distances for the transportation of persons or property."

On October 26, 1911, the commission served notice on all carriers to file with the commission on or before January 2, 1912, a complete list of each rate or charge not in conformity with the long and short haul clause, in every case in which the carrier desired to continue to deviate from the long and short haul clause. This time was afterward extended to February 15, 1912.

Some of the carriers having filed their petitions for relief from the provisions of the long and short haul clause, the commission, on January 2, 1912, held a hearing upon the petitions.

On February 15, 1912, the commission issued an order authorizing the carriers to continue deviations from the long and short haul clause until the petitions had been finally passed upon by the commission.

Previous to said order of February 15, 1912, an extended investigation was made by the Rate Department of the commission, under the commission's instructions and supervision, with reference to the deviations from the long and short haul clause, on the part of the carriers, including the defendants herein, as shown by said petitions.

The evidence in this proceeding shows clearly that the investigations thus conducted by the Rate Department were extended and exhaustive, and that frequent conferences on this subject were held, as the investigation proceeded, between the commission and its Rate Department, prior to the order of February 15, 1912. This investigation, as shown by the evidence herein, covered not merely the general subject, but also was specifically directed to the individual deviations shown in the petitions of the carriers. The order of February 15, 1912, was based upon these investigations.

Complainant's claims in this proceeding are accordingly without merit.

As this commission has, after investigation, authorized the carriers, pending the further order of the commission, to continue the deviations from the long and short haul clause herein involved, and as the question of the violation of the long and short haul clause is the sole basis for the claim to reparation herein, the complaint should be dismissed.

I submit herewith the following form of order:

Order

A public hearing having been held in the above-entitled proceeding, and the case having been submitted and being ready for decision,

It is hereby ordered that the complaint in the above-entitled proceedings be and the same is hereby dismissed.

The foregoing opinion and order are hereby approved and ordered filed as the opinion and order of the Railroad Commission of the State of California.

Dated at San Francisco, California, this 8th day of November, 1915.

MAX THELEN,
H. D. LOVELAND,
(Seal) ALEX. GORDON,
EDWIN O. EDGERTON,
FRANK R. DEVLIN,
Commissioners.

A true copy:
H. G. MATHEWSON,
Assistant Secretary Railroad Commission State of California.

No. 2643

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit.

SOUTHERN PACIFIC COMPANY, a corporation,
Plaintiff in Error,

vs.

CALIFORNIA ADJUSTMENT COMPANY, a corporation,
Defendant in Error.

Supplemental Brief by Plaintiff in Error

By way of supplement to the oral argument we desire to add that which lack of time prevented counsel from presenting orally.

I.

Throughout the brief and argument of defendant in error appears the assumption that the lesser rate for the greater distance is a matter of choice on the part of the railroad carrier and because "voluntary" on its part affords an additional reason why that rate should be applied as a maximum at intermediate points.

The case of *Louisville & Nashville Railway Co.* vs. *Walker,* 110 Ky. 961 (63 S. W. 20), cited by counsel

(p. 53, Dft. in Error, Brief) was possibly in his mind. That decision says (p. 965, 110 Ky.):

> "The carrier is allowed by the Constitution to fix the rate for the longer haul, but when he so fixes it this rate is the limit beyond which he cannot go in charging for the same service in the shorter haul."

Counsel's assumption is erroneous. The carrier has no control over the through rate, even under the long and short haul idea. The through rate is involuntary. Under the Fourth Section of the Interstate Commerce Act, as amended in 1910, the through interstate rate where it is less than intermediate rates is fixed by the commission irrespective of what rate the carrier proposes. Under both the California Constitution of 1879 and the Eshleman Act the through rate between points in California is fixed by the Commission—a state-made rate. Under the California Constitution, as amended October 10, 1911, as supplemented by the Eshleman Act, the through California intrastate rate is still fixed by the commission without the carrier's initiation or consent, subject only to Federal constitutional guaranties.

Thus the through rate, which counsel, by isolating a sentence of but one of the applicable constitutional provisions, seeks to apply as an absolute measure of all intermediate rates, is a rate beyond the control of the carrier. Take, if you please, the situation between San Francisco and Los Angeles—a 27½-cent per 100-lb. through rate for a certain class of commodities—say rice. The carrier could not either be-

fore or after the amendment of October 10, 1911, refuse to carry between Los Angeles for that and nothing more or less, without subjecting itself to the drastic penalties enforceable during both periods. If not confiscatory—and confiscation will not be presumed—it was a lawful rate even under the theory of defendant in error, both because no lesser rate existed to a point beyond, and because the commission had established and promulgated it. Assuming, then, as we think must be assumed, that the 27½-cent rate on rice from San Francisco to Los Angeles (rate pleaded in Count No. 119, Complaint, Record Vol. 2, p. 328) was a legally chargeable rate on that commodity for the through haul, because it was commission-established and because no lower rate on rice existed from San Francisco to a point beyond Los Angeles, what then was the carrier's situation? The commission had established, as we offered to show, the rate of 36 cents per 100 lbs. on rice from San Francisco to Fresno, a point intermediate San Francisco-Los Angeles, upon the collection of which Count 119 is based (Record Vol. 2, p. 328). Claims defendant in error the 27½-cent rate was the lawful rate to Fresno as well as to Los Angeles, because we were then, under the compulsion created by the commission-made rate, charging 27½ cents for the longer haul.

Suppose we concede, for the sake of argument, that the claimant's contention is correct as to that one intermediate rate. Suppose the through Los Angeles rate on rice applies to Fresno, though the Commission had said otherwise, and in perfect good

faith we had collected and Kamikawa Bros., plaintiff's assignor, had paid the 36-cent rate. Let us suppose then that Kamikawa Bros. on the same day had made a similar shipment of rice to Bakersfield, and that the commission-established San Francisco-Bakersfield rate had been 35 cents. Under counsel's theory they also on the Bakersfield movement would be entitled to the difference between 27½ cents and 35 cents, which would make the rate on rice from San Francisco to both Fresno and Bakersfield, 107 miles apart, 27½ cents per 100 lbs., the through Los Angeles rate. This, counsel contends, would be the lawful rate for the movement, no matter what the commission might say, except upon an application to and investigation by it after October 10, 1911, and from which the Commission had no power to deviate prior to October 10, 1911, as counsel claims that there was nothing in the Constitution of 1879 tantamount to a relieving clause.

Then, if counsel be correct, the 27½-cent rate would still apply to Mojave, 68 miles south of Bakersfield and 175 miles south of Fresno. So that whatever might be the judgment and order of the commission as to competitive conditions, operating difficulties or any other of the elements of rate-fixing, the railroad might charge for hauling rice from San Francisco to any point between it and Los Angeles 27½ cents per 100 lbs. because that is the San Francisco-Los Angeles rate, and because by so charging it would not be exceeding the rate to the more distant point, whether that point be Fresno, Bakersfield, Mojave or Los Angeles. The through

rate is claimed to be a non-elastic measure; the commission-made intermediate rates pass away; nothing is left to regulation but the through rate. This must be so, because it cannot be presumed that in fixing 27½ cents to Los Angeles and 36 cents to Fresno the Commission had in mind any other than 36 cents to Fresno. If the carrier then were obligated to charge not 36 cents but "charges not exceeding" (Const. XII, 21) 27½ cents to Fresno, it might charge 25 cents to one, and 26 cents to another, perhaps leaving the shipper to a remedy before the commission for discrimination between shippers at Fresno, but throwing the San Joaquin Valley rate structure into chaos. And further, if, under counsel's contention, 27½ cents measures the intermediate maximum rice rate at points intermediate San Francisco and Los Angeles, the 36-rate at Fresno and the 38-cent rate at Bakersfield pass away, and the carrier may charge 27 cents at Fresno, and 27½ cents at Bakersfield, free from control except a possibility of a charge of discrimination between the two communities.

This same illustration can be made as to each count in the complaint.

Counsel's contention would force upon the commission prior to October 10, 1911, the duty of fixing a reasonable rate between terminals, which are in California almost always competitive points, and then either shading the through rate each way, or establishing it as a fixed rate at each intermediate station. It must be remembered that under the Cali-

fornia system, both before and after October 10, 1911, the commission-fixed rates are not mere maxima. They are absolute rates, not to be departed from except under heavy penalties, recoverable by the State.

If our claim be true that the commission-established rates were valid on October 10, 1911, it follows that if counsel's claim be correct that a new rule was then made, we would have the situation on October 10, 1911, that there were no rates save those which the carrier saw fit to charge, subject only to the mandate that no less should be charged for the longer than for the shorter haul. That this claim was foreseen by the draftsman of the amended Section 22 of the Constitution is shown by the provision that the Eshleman Act was continued in force, and that it have the same force and effect as though it had been passed after the amendment and by Section 18 of the Eshleman Act it is stated:

> "All rates of charges for the transportation of passengers and freight, and all classifications established by the commission shall remain in effect until changed by the commission."

The framer of the amendment to Sections 21 and 22 well knew that for more than thirty years the long and short haul, non-penal, clause of the Constitution of 1879 (Art. XII, Sec. 21) had been treated by the public, the commission and the carriers as controlled by the provision in Section 22 giving the commission power to fix rates, making those rates conclusively just and reasonable, and imposing se-

vere penalties on carriers for deviating therefrom. Likewise he well knew that the commission had established thousands of rates prior to October 10, 1911, in which the long and short haul principle was not observed.

We have shown that both the old and the new California constitutional provisions respecting the fixing and collection of railroad rates, as well as the series of Legislative acts intended to supplement those provisions and carry them into effect, consistently declare that the carrier shall not collect or receive any greater, less or different compensation for services performed than that established by the commission. In other words the California system absolutely negatives any theory of maximum rates and gives the carrier no right to vary from the rate fixed by the commission. But counsel says that the rate, for instance, on rice from San Francisco to Fresno, is not 36 cents, the only rate on rice for that haul one can find in the tariffs established by the commission, but that the carrier should charge not more than 27½-cent Los Angeles rate. It would necessarily follow, therefore, that there is no rate on rice from San Francisco to Fresno, since if the commission's established rate of 36 cents is an illegal and unlawful rate, the carrier has no means of determining what rate the commission would have established if it had been absolutely bound, as claimed by counsel, to fix a rate to Fresno at not more than any rate to a point beyond Fresno on the same line or route in the same general direction. This position in its last analysis would mean that

there are no rates in the San Joaquin Valley which the carrier is bound to observe, and that the carrier may charge any sum it pleases so long as it does not exceed the confessedly legal through rate between San Francisco and Los Angeles (which we say is confessedly legal because it is no more than that to any point beyond), and so long as it does not lay itself open to the charge of discrimination as between persons or communities, the rights of which must be asserted by application to the Railroad Commission and must, preliminarily at least, be redressed by that body. In other words counsel's theory substitutes for the presumably consistent and harmonious system of through and intermediate rates contemplated by the California Constitution and statutes, a system of rates made by the commission between terminals which cannot be deviated from without penalty, but which as to points between terminals need be observed by the carrier only as maximum rates.

Hence, having in view the evident care to make the Eshleman Act of 1910 an integral part of the amendment, it is fair to say that, in view of the utter confusion that would result if immediately and automatically on the adoption of the amendment all rates in violation of the long and short haul clause were made illegal, necessitating application, investigation and relief if competitive conditions at the more distant point were observed, the framer of the Act had in mind the provisions of Section 18 of the Eshleman Act that the rates which had been "es-

tablished by the commission shall remain in effect until changed by the commission."

This construction, which is a reasonable one, necessitates no relieving orders by the commission; it needs no new establishment of rates; it merely preserves in effect existing commission-established rates, and herein both counsel and the learned District Judge, we respectfully submit, missed the significance of this point, which we endeavored to preserve by separate defense as well as by offer of proof.

How illogical, not to say unfair, appears the contention of defendant in error when it seeks recovery by using as a subtrahend a state-established rate, a rate the reasonableness of which might only be questioned by proceedings before the commission by any community, person or carrier affected; a rate the sanctity of which was not violable by the carrier except under pain of severe penalties; a rate clearly not inhibited by the long and short haul clause. And, seemingly by way of apology, we are told that this through rate, beyond our control, should govern recovery because we might either have raised it or have reduced the intermediate rates. That the former was commercially impossible, even if the commission had so authorized, is pleaded; that the latter would be confiscatory is also pleaded. (Separate Defense I, Record p. 337, to which demurrer was sustained.)

Further, counsel characterizes the rates established by the California commission in violation of a claimed inflexible long and short haul principle as "unlawful" and "illegal" and other epithets that

add nothing to argument. But if the commission flew in the face of the isolated second sentence of the old Section 21 which counsel carefully carves out of the section to save it from unconstitutionality; if this selected sentence is "mandatory and prohibitory" standing alone, despite that the obligation on the carrier to charge the rates fixed by the commission (vide Sec. 22) is equally "mandatory and prohibitory"; or, to be specific, if the commission orders, as it did here, a 27½-cent rate on rice from San Francisco to Los Angeles and a 36-cent rate on the same rice from San Francisco to Fresno —which rate was the carrier to treat as illegal and unlawful? Counsel says the greater rate to the lesser distance. The rate greater than what? Counsel would say than the Los Angeles rate. But that rate was an integral part of a rate scale established by the commission—a scale which presumably counterbalanced competitive and operating conditions, so as to give the carrier a reasonable remuneration for the "selected commodity or class of traffic." (*Norfolk & Western* vs. *West Virginia,* 236 U. S. 605.) We think counsel's position untenable. The State, having delegated to a rate-fixing body the power to regulate rate structures, cannot, by casuistic construction of constitutional provisions and by ignoring the rule requiring such provisions to be construed *in pari materia,* "eat its cake and have it, too."

If the railroad shall not charge more for the shorter than for the longer distance, irrespective of competitive conditions and without power of relief

by court or commission, except where the Federal Constitution is violated, can the avid shipper select a through rate and stand on it and apply it to measure all intermediate rates? Irrespective of the civic immorality suggested by such a situation, we say that in the case at bar he cannot do so without infringing the Federal Constitution.

Our record here is sufficient on that point. We pleaded that the through rate was water-compelled and less than reasonable for the service performed, and that the intermediate rates collected were reasonable and if reduced to the level of the through rate would be less than reasonable. (1st Separate Defense, Record Vol. II, pp. 337-8-9.) The trial court (Record Vol. II, p. 356) sustained a general demurrer to this defense.

Surely it cannot be that, aside from our general constitutional point that we could not be forced, at least in the absence of a hearing to establish these less-than-reasonable intermediate rates, we are placed in the position where a shipper can apply a less-than-remunerative rate to a given class of traffic, without consent on our part, without due process of law, and in the face of adverse action by a duly constituted state tribunal.

Nor can the State Constitution accomplish this unjust and confiscatory result merely by its say-so, and even though a sentence culled from a number of others may on the "mandatory and prohibitory" argument be given such a first impression construction.

Counsel's construction of the old Constitution means, in its last analysis, that where rates were, as he would term it, "ostensibly established" by the commission, and the scale of rates so established violated his selected, non-penal, long and short haul clause, the whole rate scale would be void, because it cannot be argued that such rates were not, in the mind of the commission, interdependent, and, one portion thereof being void, the whole would fall. The result would be that, in spite of the elaborate and adequate scheme of rate regulation created by Constitution and statute, we never have had in California, up to this day, any commission-made rates where the rate structure involved a greater charge for a lesser distance, except where, since October 10, 1911, the commission (according to counsel's contention), after formal application by the carrier and upon an investigation and hearing corresponding to the procedure in a court of record, promulgated a scale of rates on a certain line of railroad where the long and short haul principle was not observed. At least in the absence of such formal proceeding counsel would have us believe that we have had no commission-made rates except through rates.

It is not, therefore, a *reductio ad absurdum* to say that if counsel's position be correct the California carriers since October 10, 1911, have been and are now, save where such formal application, investigation and rate fixation have been had, free to charge what they please within California, so long as they

do not violate the isolated clause which is relied upon as the Magna Charta of the defendant in error.

The difficulties we have suggested as arising from the extreme positions taken by defendant in error vanish when are considered seriatim the points we make that:

1. The old long and short haul Section 21 of Article XII was unconstitutional in whole, as an interference with interstate commerce.

2. If not void in its entirety it should be construed with Section 22 so as to allow the commission to establish rates in deviation from it, because:

(a) To give it an inflexible operation so as to compel carriers to haul at a less than reasonable rate would be violative of the 14th Amendment; and

(b) It can at best be construed only as a rule coupled with a relieving power given the commission by Section 22 to establish conclusively just and reasonable rates.

3. Therefore the rates fixed by the commission prior to October 10, 1911, and evidenced by tariff on that date were continued in force after October 10, 1911, and until changed by the commission, because:

(a) The Eshleman Act, adopted by the amended sections, expressly says so.

(b) To hold otherwise would be to give the long and short haul clause in the amended section an immediate operation without notice or hearing as to rates which, as here pleaded, are confiscatory.

4. That irrespective of the operation of the Eshleman Act as a part of the amended sections, the rates collected by plaintiff in error after October 10, 1911, were legal rates, because

(a) The commission had the power to continue them in effect, and *sua sponte* did so by formal order; and

(b) The commission did expressly relieve the carrier as to all of the collections here involved, save those between October 10, 1911, and November 20, 1911.

Throughout the contentions made by defendant in error in this case there runs the error of attempting to treat the powers of the Interstate Commerce Commission and the powers of the California Railroad Commission as identical with respect to fixing rates. That this is an error, and that it materially impairs the analogy counsel seeks to draw between the Interstate Commerce Commission and Federal decisions and the California situation, is quite apparent when we consider the provisions of the California Constitution and the California Acts.

Section 22, Article XII, California Constitution, as it existed prior to October 10, 1911, gave the commissioners the power and made it their duty to establish rates of charges for railroads, which rates were declared to be conclusively just and reasonable.

Section 22, as amended October 10, 1911, gave the commission power to establish rates of charges, and provided that no railroad company should charge a

greater, less or different compensation than the rates established by the commission.

Section 18 of the Eshleman Act, effective February 10, 1911, and expressly continued in force and made a part of the amended sections of the Constitution, and so remaining in effect until March 23, 1912, expressly gave the commission power to fix rates for transportation.

Under the decision of the Supreme Court in *Pacific Telephone & Telegraph Co.* vs. *Eshleman,* 166 Cal. 640, it was clearly competent for the Legislature to absolutely vest the rate-fixing power in the commission, irrespective of any limitations of the Constitution. Counsel argues that such vesting should not be inconsistent with the constitutional powers conferred upon the commission, and that to allow the commission to fix rates after October 10, 1911, and in violation of the long and short haul clause would be inconsistent with the clause in the Constitution; but this does not follow under the decision of the California Supreme Court above referred to, which holds that the section with regard to unconstitutionality only means that the Legislature may not curtail any of the powers vested by the Constitution in the Railroad Commission, and that the legislative authority to confer any kind of additional powers is plenary and unlimited by any constitutional provision; and further, that this was designed and delivered to the end that the Railroad Commission should have its labors unvexed and its results untrammeled by the courts of the State. The discus-

sion of this phase of the powers of the commission under legislative enactments adopted after the passage of the amended Sections 21 and 22 may be found beginning at page 654 of 166 California Reports.

In the case of the Interstate Commerce Commission the situation is entirely different. (Drinker on Interstate Commerce Act, Vol. I, Sec. 270.)

One of the most important questions under the Act to Regulate Commerce, as it stood prior to the amendment of 1906, was whether the commission had power to prescribe maximum rates which carriers might charge in the future. The commission was not in terms given power to fix rates for the future, but was only required to enforce the provisions of the Act, which, among other things, provided that all rates should be reasonable.

The commission held, in *Perry* vs. *Florida etc. Railway Co.,* 5 I. C. C. 97:

> "It is not, of course, asserted that the Act confers on the commission the general power to prescribe the traffic charges of carriers subject to its provisions. The general scope of the Act, as well as its specific provisions as to complaints to and investigations by the commission, forbids such an interpretation."

But the commission did hold that, after a complaint had been made or an inquiry had been instituted by the commission, it was not restricted simply to finding the fact and forbidding the carrier to continue to charge the existing rate, but that it might go farther and enforce a reasonable rate.

The Supreme Court first discussed this question in the Social Circle case (*Cincinnati etc. Railway Co.* vs. *Interstate Commerce Commission,* 162 U. S. 184), and there intimated, without deciding, that the Act gave the commission no power to fix rates. Several circuit courts followed this dictum in a number of cases (74 Fed. 70; 74 Fed. 715; 74 Fed. 784; 76 Fed. 183), but the Supreme Court, in *Interstate Commerce Commission* vs. *Cincinnati etc. Railway Co.,* 167 U. S. 479-511, decided definitely that the commission had no power to prescribe rates which should control in the future, and that it could not, therefore, invoke from the courts a peremptory order to enforce any such tariff by it prescribed. Mr. Justice Brewer makes this clear, at the end of the opinion.

A number of later cases follow this decision, among which are *Interstate Commerce Commission* vs. *Alabama etc. Railway Co.,* 168 U. S. 144, and *Interstate Commerce Commission* vs. *Southern Pacific Co.,* 132 Fed. 829.

After the decision in *Interstate Commerce Commission* vs. *Cincinnati etc. Railway Co.,* 167 U. S. 479, the amendment of 1906 to paragraph 1 of Section 15 of the Act to Regulate Commerce was given effect. This gave the commission express power to determine, after hearing or complaint, what are reasonable rates for the future, and to require the observance of such rates. As to that section, the author of Drinker on Interstate Commerce says, in Section 273:

"In a number of the Federal cases above cited, holding that prior to this amendment the commission had no such power, the decision was rested on the ground that to prescribe rates for the future was a legislative and not a judicial act, and therefore one which the commission could not perform. If this be entirely true, there would seem to be some doubt as to the power of Congress to delegate a strictly legislative function to a quasi-judicial body. It is submitted, however, that there is a clear distinction between the prescribing of rates generally without any complaint, controversy or special investigation, and directing the observance of a certain particular rate or schedule, after judicial investigation of its propriety. It might well be that Congress would not have power to constitute the commission a general manager for all the railroads in the country, or to give it authority to evolve rate schedules for all lines out of its own consciousness, but the commission does not and never has claimed such extensive power. Congress would seem clearly to have power to authorize it to enforce the provisions of the Act by ordering compliance with rates, which, on investigation, it judged reasonable. In so doing it acts not in a legislative but in a judicial capacity.

It will be noted that Section 15 does not expressly authorize the commission to fix rates in a proceeding instituted on its own motion, but only after full hearing on complaint filed."

It is clear, therefore, that the Interstate Commerce Commission has not the power *sua sponte* to fix rates for carriers subject to its jurisdiction,

but that this power can only be invoked by application of the carrier or by a complaint made before the commission, in both of which cases notice, with opportunity to produce witnesses and testimony, is necessary. This applies even in the case of a carrier desiring to deviate from the long and short haul clause of the Interstate Commerce Act, but only when the extent of the deviation proposed by the carrier is not acquiesced in by the commission. In other words, the carrier's rates being primarily carrier-made rates and not commission-made rates, if the carrier files a tariff with the commission, which deviates from the long and short haul principle, the commission is satisfied with the tariff as it stands the tariff is filed and goes into effect at the expiration of the statutory period of notice. If the commission does not approve of some or all of the deviations proposed, it places the tariff on what it terms its Investigation and Suspension Docket, holds a hearing, and gives a decision which may or may not give the carrier the full measure of variation from the long and short haul principle to which it feels that it is entitled by reason of competitive conditions at the more distant point.

The volumes of the reports of the commission since the adoption of the long and short haul clause in 1910 are replete with illustrations. This qualification should be observed, that when a carrier applies to the Interstate Commerce Commission for permission to deviate from the long and short haul clause, and the commission finds that some reason exists for the deviation, and establishes the rate to

the more distant point, it need not establish it at the rate proposed by the carrier. This power of the commission, whether exercised or not, makes the long haul rate a commission-made rate, even though it be the same rate as that proposed by the carrier.

In thus claiming that the California rates are made under a system which vests the right to initiate them in the commission and not in the carrier, as distinguished from the Interstate Commerce Act, I do not mean to say that the California Commission has or ever had the power to fix rates which are confiscatory or which do not afford the carrier due process of law, if the carrier sees fit to complain that either of those constitutional guaranties is not being observed; but where the California Commission fixes a scale of rates, though it may be confiscatory in effect, and though no notice may have been given or hearing had, it is manifestly binding on the public because the public agency has fixed it, and it is equally binding on the carrier unless the carrier, by judicial review, seeks its annulment or change. There also runs with this fixation the remedy provided by the California Act, under which the commission itself may reopen the question and institute an investigation, or the carrier may file a complaint and ask for a hearing, or any person or community affected may likewise file a complaint and ask for a hearing, whereupon notice must be given to the carrier.

The utter confusion in counsel's argument arises from the fact that he has failed to recognize the radical distinction between the method of fixing in-

terstate rates and the method of fixing California intrastate rates. The former are carrier-initiated and in most cases carrier-established maximum rates. The latter are commission-initiated and established, and are not maximum rates, but are moving rates—that is, rates which cannot be deviated from by the carrier, and which the carrier must evidence by tariffs filed with the commission within the time specified in the rate-fixing order, if such tariffs are not already on file. Of course in the case of interstate rates the maximum character of the rates does not dispense with the necessity of filing tariffs; the order always is that the carrier shall file tariffs within a certain time at not to exceed the rate specified in the Interstate Commerce Commission order, and it may file tariffs at less than such rates, where conditions appear to justify it.

To summarize: under the Interstate Commerce Act tariffs are merely evidence of rates which the carrier has proposed and the commission acquiesced in, or which the commission has ordered; under the California system, old and new, tariffs are merely evidence of rates which the commission itself has established.

Apropos of counsel's remark at the oral argument, that the California Commission had tried by its Decision No. 2884 of November 8, 1915, to "bolster up" its relieving orders, it may be remarked that the California Commission is given by the California constitutional and statutory provisions, all the power that any commission act has

ever conferred and powers far in excess of those possessed by the Interstate Commerce Commission.

As said by the Supreme Court in considering an order of the Interstate Commerce Commission, a body whose functions, as we show, are much more limited than those of the California Commission:

> "(p. 470) Power to make the order, and not the mere expediency or wisdom of having made it, is the question."
>
> *I. C. C.* vs. *Illinois Central,* 215 U. S. 455.

And in *I. C. C.* vs. *Union Pacific,* 222 U. S. 541 (p. 547):

> "There has been no attempt to make an exhaustive statement of the principle involved, but in cases thus far decided it has been settled that the orders of the commission are final unless (1) beyond the power which it could constitutionally exercise; or (2) beyond its statutory power; or (3) based upon a mistake of law. But questions of fact may be involved in the determination of questions of law, so that an order, regular on its face, may be set aside if it appears that (4) the rate is so low as to be confiscatory and in violation of the constitutional prohibition against taking property without due process of law; or (5) if the commission had acted so arbitrarily and unjustly as to fix rates contrary to evidence, or without evidence to support it; or (6) if the authority therein involved has been exercised in such an unreasonable manner as to cause it to be within the elementary rule that the substance, and not the shadow, determines the validity of the exer-

cise of the power. *I. C. C.* vs. *Illinois Central,* 215 U. S. 452, 470; *Southern Pacific* vs. *I. C. C.,* 219 U. S. 433; *I. C. C.* vs. *Northern Pacific,* 216 U. S. 538, 544; *I. C. C.* vs. *Alabama Midland,* 168 U. S. 144, 174.

In determining these mixed questions of law and fact, the court confines itself to the ultimate question as to whether the commission acted within its power. It will not consider the expediency or wisdom of the order, or whether, on like testimony, it would have made a similar ruling. 'The findings of the commission are made by law *prima facie* true, and this court has ascribed to them the strength due to the judgments of a tribunal appointed by law and informed by experience.' *Illinois Central* vs. *I. C. C.,* 206 U. S. 441. Its conclusion, of course, is subject to review, but when supported by evidence is accepted as final; not that its decision, involving as it does so many and such vast public interests, can be supported by a mere scintilla of proof—but the courts will not examine the facts further than to determine whether there was substantial evidence to sustain the order.''

The California Commission's Decision No. 2884, was made in a contested case, and clearly speaks for itself.

II.

There can be no question that a state has the power to regulate rates on railroads for movements beginning and ending within its borders, provided always that such regulation, either in its manner,

as by lack of due process of law, or in its effect, as in cases of confiscation and interference with interstate commerce, does not infringe the provisions of those or other sections of the Federal Constitution.

What we now have to say as to the competitive situation between San Francisco and Los Angeles, is not in challenge of the state's right to regulate that situation, if it do so competently, but to the point that the construction of certain sentences of the state system insisted on by counsel for defendant in error is manifestly incompatible with the general system of state-made rates contemplated by both the old and the new sections of the California Constitution.

If your Honors will look at a map showing the rail lines in California between San Francisco and Los Angeles, you will see that the Southern Pacific Company has a direct line through Fresno, Bakersfield and Mojave, and another line, of practically the same mileage, through Salinas, San Luis Obispo and Santa Barbara. The Santa Fe, which virtually parallels the Southern Pacific from San Francisco Bay to Bakersfield, at Mojave trends eastward and runs through Barstow and San Bernardino in its course to Los Angeles. The Southern Pacific also has a line from Los Angeles eastward, which passes through San Bernardino.

The Southern Pacific is compelled by the State commission, as we offered to show and were not permitted to show, to put in certain through rates, in-

cluding a rate of 27½ cents per hundred pounds on rice from San Francisco to Los Angeles. This compulsion, as we pleaded and were not permitted to show, is by reason of an actual water competition on the Pacific Ocean between the port of San Francisco and the port of Los Angeles and the ports immediately adjacent thereto. It is true that we pleaded that this is a less than reasonable rate, but it must be remembered that if we challenged the 27½ rate to Los Angeles and secured a higher rate from the commission, we would have to go out of the rice-hauling business between San Francisco and Los Angeles, just as we would have to go out of the business of hauling all other commodities between San Francisco and Los Angeles which could be transported by water at a lesser rate than that established by the commission.

But the Santa Fe commission-made rate on rice between San Francisco and Los Angeles, a considerably greater distance than by Southern Pacific, is exactly the same as the Southern Pacific rate—27½ cents. This comes about because of the well-known rule in rate-making that the conditions obtaining on the shorter line fix the rates for transportation between the same points on the more circuitous route—in this case the Santa Fe—and even when rail carriers are free to fix their own rates, the longer line must meet the rate of the shorter line or go out of business.

Also, where commissions fix the rates, it is customary, as is the case in the instance of every com-

modity moved between San Francisco and Los Angeles by rail, that the commission, as to the Santa Fe, which is the longer and more circuitous route, must fix the Santa Fe rates between San Francisco and Los Angeles on a given commodity at least as low a figure as those fixed for the Southern Pacific, because otherwise the Santa Fe could move no traffic. Traffic, like water, flows along the line of least resistance, and granted that the facilities are equal, the line of least resistance is defined by the lowest rates. That is so true in railroad rate-fixing as to be axiomatic.

According to the contention of the defendant in error, the commission-made rate of 27½ cents on rice is applicable to the Southern Pacific and the Santa Fe as the maximum rate at all points on each line intermediate San Francisco and Los Angeles. That would result in a consignee at San Bernardino being deprived of the real competitive advantages to which San Bernardino is naturally entitled, because, the Railroad Commission having established a rate of 27½ cents over the Santa Fe on rice to Los Angeles, that rate, according to counsel, would automatically apply as a maximum to San Bernardino. At the same time, the Southern Pacific Company would be obliged to charge the same consignee, if he ordered his rice shipped over the Southern Pacific lines, the commission-made rate of 27½ cents to Los Angeles, which is unchallenged here, plus the commission-made established local rate over the Southern Pacific line from Los Angeles to San Bernardino.

The result would be that the Southern Pacific would be driven out of the San Bernardino rice business, and San Bernardino would thereby be deprived of competition between the two points, which competition consists not only in the cost of carriage but also in the efforts of competing companies to secure for and hold business to their lines by superior facilities, expedition of transportation, and all of the other elements of service, which, under our modern theory of rate-making, afford competing carriers the only way of gratifying customers and holding their patronage, rebates and secret preferences having been stigmatized and forbidden. We give this illustration in support of our theory that under the old sections of the Constitution the provision in Section 22, Article XII, giving power to the commission to fix rates, and making those rates conclusively just and reasonable, must be considered *in pari materia* with the non-penal provision of Section 21, constantly referred to herein as the long and short haul clause, and that unless so construed countless situations occur where a California community is deprived of the advantages of its location on two or more competing lines of railroad.

In actual practice, and for years, the situation described has been regulated by the commission, so that in most cases, unless transportation difficulties are insuperable, a community situated on two lines of railroad has its choice of either line from the originating point, so far as rates are concerned.

It is manifest, then, that not only did the Constitution of 1879, by a proper construction of Sections

21 and 22 *in pari materia,* safeguard the public against the condition we have endeavored to depict, but also that when the Constitution was amended on October 10, 1911, the retention of Section 18 of the Eshleman Act, providing that the rates fixed by the commission should remain in effect until changed by the commission, was intended to preserve the rates then in effect, even though they may have been in violation of an isolated long and short haul sentence, until the commission might readjust any situations that required readjustment, thereupon remodeling the rate structure immediately involved, so as to give full allowance to a community favorably situated, whether its favorable situation were due to water competition or to the presence of two or more competing railroad lines.

Another illustration of the fallacy of the contention of defendant in error in endeavoring to apply the through rate inflexibly as a measure for intermediate rates, may be given by still using the figures for the transportation of rice. The assignor of defendant in error in Count 119 shipped rice from San Francisco to Fresno under a 36-cent rate, which was contained in the tariffs promulgated by the commission. It is claimed that this 36-cent rate was not the rate as to that shipment, but that the rate was 27½ cents, the through Los Angeles rate.

But suppose that the same shipment of rice had originated on the Northwestern Pacific at, say, Santa Rosa. In the absence of a joint through rate between the Northwestern Pacific and the Southern

Pacific from Santa Rosa to Fresno, the rate under obvious and familiar principles of rate-construction would be the sum of the two local rates, the rate from Santa Rosa to San Francisco on the Northwestern Pacific, plus the rate from San Francisco to Fresno on the Southern Pacific. It is manifest that the Southern Pacific Company's proportion of a rate so constructed would be 36 cents from San Francisco to Fresno. Counsel may say that the shipper could ship over the Northwestern Pacific from Santa Rosa to San Francisco, and then, by shipping from San Francisco to Fresno, take advantage of the Los Angeles 27½-cent rate, but that would necessitate the shipper's taking delivery at San Francisco, having a new bill of lading issued, and assuming all of the risks incident to the breaking of a carriage intended to be continuous and the responsibility of transferring his shipment from the Northwestern Pacific's custody to the custody of the Southern Pacific, and making arrangements for this intermediate carriage from the freight-sheds of one company to the freight-sheds of the other in San Francisco. Even if the Northwestern Pacific and the Southern Pacific had a joint through rate from San Francisco to Fresno, the joint through rate whether carrier-established or commission-made would be based on the sum of the local rates as fixed by the commission. The Los Angeles rate from San Francisco would have nothing to do with it.

We have given these illustrations and others to show that the principle contended for by defendant in error would throw the rate situation in Califor-

nia into a state of utter confusion; that it is not at all consonant with the idea of state-made, invariable rates; that it introduces into California rates the theory of maximum rate, which was definitely abandoned by this State in 1879, and that if the maximum rate theory be read into the Constitution and statutes of this State the tariffs established by by the commission are, except as to through rates where no lesser rate exists on the same line made of no avail; that the door is again opened to favoritism and discrimination, both between persons and communities, subject only to the right of the State to impose a penalty therefor, and to the right of the individual to apply to the commission, secure a reparation order on the ground that he has been discriminated against (California Public Utilities Act, §71-a), and then, if the order be not obeyed, to sue on the order.

We think it cannot be supposed that the framers of the Constitution and of the amendments thereof, or the people of California, were so short-sighted and fatuous as to introduce into each of the constitutional sections a single sentence which, standing alone, and given the interpretation counsel seeks to put upon it, would practically destroy the rate publicity and uniformity contemplated by the commission method of fixing rates. We think, therefore, that the California Commission was correct when it said that under a system of state-made rates reparation could not have been contemplated where the carrier had charged the rates established by the

commission. (2 C. R. C., Dec. 635, cited in our opening brief.)

This becomes more significant when we consider that in the case at bar there is not even a pretense that the rates charged were unreasonable in view of the service performed, or that the assignors of the defendant in error had been pecuniarily damaged in any sum.

III.

Beginning at the bottom of page 65 of the brief of defendant in error, its counsel, evidently realizing that it would be futile to contend that there was any right of action at common law, seeks to found his action herein upon the non-discriminatory sections of the California Constitution and statutes, to which he refers at length and which he apparently thinks give a right of action in court by a shipper, without having first applied to the California Commission under Section 71-a of the California Public Utilities Act, and without allegation or proof of damage. He then states, at the top of page 66, that the charging of more for the shorter than for the longer distance is discrimination; that "The statutes of 1909 and 1911 confer a right of action for damages upon any person injured by such discrimination", and that the Public Utilities Act expressly confers a right of action for damages upon any person injured by a violation of the prohibition against charging more for the shorter than for the longer distance. He then says that the complaint states the facts, from which it follows as a matter of law

that damage has resulted and that no evidence in support of those allegations was necessary.

After discussing the cases cited by us in our opening brief, he begins, on page 78, to discuss certain decisions of the Interstate Commerce Commission in which the commission awarded damages without any specific proof of the fact that the complainant had been damaged, or of the amount in which damage had been sustained. *In discussing these decisions by the Interstate Commerce Commission he entirely overlooks the very clear distinction which has been drawn by that commission between applications to the commission based on the charging of an unreasonable rate where the commission has held that the difference between the reasonable rate and the unreasonable rate charged was per se the measure of damages, and the cases where application has been made to the commission, or action brought in the courts, on the ground of discrimination—which counsel admits is his complaint here—and where it has been uniformly held in the later decisions by the commission and by the courts that there must be allegation and proof of actual damage arising by reason of the discrimination, and sutained by the plaintiff or complainant, and that proof of discrimination is not equivalent to proof of damage sutained.*

A few of these cases will serve to illustrate the error into which counsel has fallen, and the soundness of our position that, in any view of the case at bar, the failure to plead and prove damage is fatal to the claims of the defendant in error:

New Orleans Board of Trade vs. *Illinois Central Railroad Co.,* 29 I. C. C. 32; decided January 5, 1914. Says the commission:

> "There is nothing in the act to regulate commerce from which a presumption of damage can be inferred, and it has never been so held.
>
> The wording of the act is as follows:
>
> > 'Sec. 8. That in case any common carrier subject to the provisions of this act shall do, cause to be done, or permit to be done, any act, matter or thing in this act prohibited or declared to be unlawful, or shall omit to do any act, matter or thing in this act required to be done, such common carrier shall be liable to the person or persons *injured* thereby for the full amount of *damages sustained in consequence of any such violation* of the provisions of this act.'
>
> As said in *Parsons* vs. *C. & N. W. Ry. Co.,* 167 U. S. 447, 460, and quoted in *Pa. R. Co.* vs. *International Coal Co., supra,* 230 U. S. 200, in construing this section:
>
> > 'Before any party can recover under the act he must show not merely the wrong of the carrier, but that that wrong has in fact operated to his injury.'
>
> And in *Pa. R. Co.* vs. *International Coal Co., supra,* it is said:
>
> > 'Congress had not then and has not since given any indication of an intent that persons not injured might, nevertheless, recover what, though called damages, would really be a penalty, in addition to the penalty payable to the government.'

> Proof of the damages resulting from the wrongful act of the carrier must be by such evidentiary facts as would be required to sustain a recovery before a court of law. *Anadarko Cotton Oil Co.* vs. *A. T. & S. F. Ry. Co.,* 20 I. C. C. 43, 51.
>
> Mere proof of specific shipments made and the freight paid and the amount for which reparation is sought does not make out a prima facie case. Something more is necessary. The complainant must show how the discrimination found to exist affected him to his damage. In other words, he must establish the *fact* of his damage as well as the *amount* of damages he claims."

John Nix & Co. vs. *Southern Railway,* 31 I. C. C. 145, decided May 4, 1914. The syllabus, which is supported by the decision, states:

> "The fact that a carrier has published rates which contravene the long and short haul rule of the fourth section of the Act, without authority therefor, is not of itself a sufficient basis for an award of reparation, in the absence of proof of damage to the shipper."

In *Ballou* vs. *N. Y., N. H. & H. R. Co.* 34 I. C. C. 120, decided April 12, 1915, the commission again makes clear its distinction between awards based on unreasonable rates and those based on discrimination. In that case the claim was of unreasonableness, and the commission held that the carrier could not be heard to say that reparation should be denied because the shipper had passed on the charge to his purchaser.

In *Spiegel* vs. *Southern Railway,* 31 I. C. C. 687, decided January 19, 1915, the commission reiterates its rule with regard to proof of damage where discrimination is the gravamen of the claim, and, impliedly overruling any former decisions it may have made, says on page 689:

> "Since our former opinions were promulgated the United States Supreme Court in *International Coal Co.* vs. *P. R. Co.,* 230 U. S. 200, has held that before an award of reparation can be made on account of undue discrimination or preference on the part of carriers subject to the act, the complainant must prove that he was actually damaged by reason of such undue discrimination or preference, and furthermore must prove the amount of such damage.
>
> Mere proof of particular shipments made and of the freight paid does not make out a prima facie case. Complainant must establish the fact and the amount of his damage. *New Orleans Board of Trade* vs. *I. C. R. Co.,* 29 I. C. C. 32."

The Federal courts have also preserved this distinction and gone even further. In *Lehigh Valley R. Co.* vs. *Clark,* 207 Fed. 717, an action brought on a reparation order of the Interstate Commerce Commission. Circuit Judge Gray of the Third Circuit says on page 724, repudiating the rule by the commission that it will presume damage in cases of unreasonableness, to the extent of the difference between the reasonable and the unreasonable rate:

> "It does not necessarily follow, from a finding by the commission that a given tariff rate

established by the defendant is unreasonable and that a lower rate fixed by the commission is reasonable, that plaintiff has suffered pecuniary damage by reason of the exaction by defendant of the former rate, or, if any such damage has been suffered, that the difference between the rate abrogated and the lower rate established is the measure of such damage. If any damage is shown, it may be even greater or less than such difference.

The authorization of a suit for damages by one claiming to be injured by a specific violation of the Act by a carrier, is not the imposition of a penalty in addition to the fines imposed and made payable to the government for every specific violation of a requirement of the Act, but a remedy for the recovery of damages actually incurred by a private person because of the wrongful act of the carrier."

In *Darnell-Taenzer Lumber Co.* vs. *Southern Pacific Co., et al.,* 221 Fed. 890, decided April 6, 1915, the Circuit Court of Appeals of the Sixth Circuit, speaking through Circuit Judge Knappen, and citing among other decisions of the Interstate Commerce Commission the Kindelon case in 17 I. C. C. 251, referred to by counsel for defendant in error, says:

"Since the foregoing decisions of the commission the Supreme Court has held, in a case involving discrimination in rates as between competing shippers, that the damages recoverable by the shipper against whom the discrimination is practiced must be proved; that the damages are not necessarily measured by the difference

between the published rate paid by the complaining shipper and the lower rate given to a more favored shipper, but may be more or less than such difference. *Penna. R. Co.* vs. *International Coal Co.,* 230 U. S. 184, 203, 33 Sup. Ct. 893, 57 L. Ed. 1446. While the commission applies this rule in discrimination cases (*New Orleans Bd. of Trade* vs. *Illinois Central R. Co.,* 29 I. C. C. 32; *Spiegel* vs. *Southern Railway Co.,* 32 I. C. C. 687), it has never in cases of purely unreasonable and excessive rates departed from the rule announced in the Burgess case. A few of the many cases, subsequent to the International Coal Co. case, in which the rule in the Burgess case has been applied by the commission are cited in the margin. While the Supreme Court in the Meeker cases reaffirmed the rule that damages in reparation cases must be proved, that Court, so far as we have seen, has not passed directly upon the proposition involved in the Burgess case and in the instant case; the nearest approach thereto being the holding in the Meeker cases that the commission did not apply 'an erroneous or inadmissible measure of damages' in finding that the shippers were damaged to the extent of the difference between what they actually paid and what they would have paid under a reasonable rate. In the Meeker cases no evidence of damages was presented except the commission's findings, and the evidence on which the commission acted did not appear.

We find nothing in either the International Coal Co. case or the Meeker cases conflicting with the view that damages resulting from the

> imposition of unreasonably excessive rates are *normally* measured by the difference between the rate charged and a reasonable rate. Cases of excessive and unreasonable rates differ from discriminating charges in the fact that in the latter there is nothing unlawful in the charging and receiving of the higher or published rate on which the demand for reparation is based; the unlawfulness is in giving a lower rate to someone else. On the other hand, the charging of an excessive and unreasonable rate is *ipso facto* unlawful."

Thus we see that the defendant in error in the case at bar cannot rely upon the theory of unreasonableness, because he has not pleaded that the rates collected were unreasonable in and of themselves. His claiming the rate collected to be excessive involves him in another difficulty, in that, if it is excessive the commission, as we have shown in the opening brief, is given the primary jurisdiction by Section 71-a of the California Public Utilities Act to pass the claim of excessiveness. He thus is driven from point to point until he arrives at the conclusion that his clients have been discriminated against and that therefore he may bring an action under the provisions of the California statutes, which he cites at length. But this position is likewise untenable, because he has not applied to the California Commission and because the very section upon which he now seeks to found his action gives a right of action only for the damages actually sustained, and he has neither pleaded nor proven that he has been damaged. The apparent bewilder-

ment of defendant in error may be accounted for by the fact, as pointed out in our briefs herein, that he is seeking to recover the difference between a charge which was established by the commission, which is not claimed to be unreasonable in and of itself, and a charge which was established by the commission for the transportation of the same class of commodity to another point and under entirely different circumstances and conditions. We do not feel that the tortured construction of the California Constitution and statutes attempted to be argued by counsel should be indulged in to the wrecking of the system of commission-made rates which carrier and shipper alike were bound to observe.

IV.

On page 42 of counsel's brief he cites and quotes copiously from *Great Western Railway Co.* vs. *Sutton,* 4 English & Irish Appeals 236; 38 L. J. Ex. 177, L. R. 4 H. L. 226. Just why stress is laid on this case we are unable to say. The case is direct authority to the point that no right of action existed at common law where one shipper was charged more than another, if the charge exacted from the complaining shipper was just and reasonable in and of itself. It is not claimed here that the intermediate rates paid by the assignors of defendant in error were unjust or unreasonable. Apparently counsel cites the case because he realizes that as the California Constitution gave no right of action, and as there was no right of action at common law, he must found his right of action upon some statutory provision.

It is true that in the Sutton case it was held that an action for money had and received was maintainable in English courts for the recovery of overcharges made in violation of the obligation imposed upon the railroad company by the Act of Parliament (8-9 Vict. 251) known as the Railway Consolidation Act of 1845, and particularly Section 90 thereof, which counsel does not quote in full on page 44 of his brief, but which was held in *Denaby Main Colliery* vs. *Manchester, Sheffield & Lincolnshire Railway Co.* (1885), 11 Law Reports, Appeal cases, to require equality of rates "passing only over the same portion of the line of railway under the same circumstances", and only as to goods passing between the same points of departure and arrival, and passing over no other part of the line.

The reasoning of the English court is founded entirely upon the supposition that the mere prohibition of the statute created an obligation to charge equally under the same circumstances, which obligation could be enforced by the action for money had and received. That this is not the law in the United States we think is shown by the cases cited in our brief to the effect that a mere statutory prohibition creating a duty or obligation unknown to the common law does not give rise to a right of action unless the same or another statute so prescribes; and further that where the legislature has prescribed a penalty for failure to fulfill this new duty, which in the case at bar is by suit by the State, no private action will lie for a violation of a prohibition as to which suit by the State is the only

prescribed means of enforcement. In *Fitchburg Railroad Co.* vs. *Gage,* 78 Mass. 393 (12 Gray 393), the Court says on page 398:

> "The recent English cases cited by the counsel for the defendants are chiefly commentaries upon the special legislation of parliament regulating the transportation of freight on railroads constructed under the authority of the government there; and consequently throw very little light upon questions concerning the general rights and duties of common carriers, and are for that reason not to be regarded as authoritative expositions of the common law upon those subjects. The principle derived from that source is very plain and simple. It requires equal justice to all. But the equality which is to be observed in relation to the public and to every individual consists in the restricted right to charge, in each particular case of service, a reasonable compensation, and no more. If the carrier confines himself to do this, no wrong can be done, and no cause afforded for complaint. If, for special reasons, in isolated cases, the carrier sees fit to stipulate for the carriage of goods or merchandise of any class for individuals for a certain time or in certain quantities for less compensation than what is the usual, necessary and reasonable rate, he may undoubtedly do so without thereby entitling all other persons and parties to the same advantage and relief."

In citing the Sutton case and the cases therein referred to, counsel entirely disregards the fact that when the State of California established a

public agency for the regulation of rates, which could not be deviated from except under extreme penalties, and continued that regulation in force by the appointment of a commission and by acquiescence in the action of such commission, the reason for the rule laid down in the Sutton case entirely ceased. This is true because at the time of the decision in the Sutton case England had no railway commission such as it has now. Railway rates were established by Act of Parliament, such as the act cited in counsel's brief and considered in the Sutton case. The Act of Parliament was supreme; no question of confiscation, unreasonableness or interference with foreign or domestic commerce could be raised in opposition to it. There was nothing in the English law to prevent the hard and fast application of the long and short haul rule, nor was there anything to prevent the requirement by Parliament that the carriers should charge certain rates and none other. It is a historical fact, abundantly evidenced by the English statutes and decisions, that the railroads of England, and particularly the one which was being considered in the Sutton case, were organized by special charters emanating from the sovereign, and that of those special charters the Railways Consolidation Act, as abundantly appears from its preamble, was made an integral part.

Therefore the Massachusetts court, in the case just cited, referred to the fact that the roads considered in the English decisions were railroads constructed under the authority of the government. The railroads so constructed had to take their

charters as they were given them, or not do business, and when they constructed and operated under their charters they were charged with the duty of observing the rates and methods of rate-fixing prescribed by the charters and by the Consolidation Act which by express provision was made a part of the charters. Therefore the English situation is not at all equivalent to the California situation, where the people have delegated the manner of rate-fixing to a commission, subject only to constitutional limitations, which properly considered, we contend made the long and short haul sentences merely admonitions to the commission, and not mandatory and prohibitory clauses as claimant contends here.

V.

The case of *L. & N. Ry. Co.* vs. *Walker,* 63 S. W. 20, 110 Ky. 961, cited by counsel on page 53 of his reply brief, may be differentiated from the case at bar because the Kentucky statute (Sec. 819, quoted in *McChord* vs. *L. & N. Ry. Co.,* 183 U. S., at p. 490), for unjust or unreasonable preference or discrimination gave to the party aggrieved a right of action for the damages sustained. Moreover, as herein pointed out, the Kentucky carrier was allowed to fix the rate for the longer haul (110 Ky., on p. 965) which is not and has never been the case in California. The case is not authority here for these reasons.

The same observation may be made as to *Hutchinson* vs. *Railroad Co.* (Ky.), 57 S. W. 25, also cited on p. 53 of counsel's brief.

As to the cases of *Junod* vs. *Railway Co.,* 47 Fed. 290, and *Osborne* vs. *Railway Co.,* 48 Fed. 49, referred to on page 53 of counsel's brief, and quoted from at length on subsequent pages, it appears that Judge Shiras, who charged the jury in both cases, based his charge on the provisions of the Act to Regulate Commerce, as he said (p. 294, 47 Fed.):

> "By the provisions of the Interstate Commerce law it is provided that parties who may have been unjustly discriminated against and who may be damaged thereby are entitled to sue and to recover the money damages caused to them by the violation of the Act, and it is under this provision of the statute that this action is brought."

The Osborne case got into the United States Supreme Court under the title of *Parsons* vs. *C. & N. W. Ry.,* 167 U. S. 447, 42 L. Ed. 231, and there the Supreme Court in affirming the judgment of the Circuit Court of Appeals in 52 Fed. 912, which reversed Judge Shiras' ruling, used this language:

> "We remark again that there is no averment in this petition that the rates charged to and paid by the plaintiff were, in themselves, unreasonable; that is, it is not claimed that the rates charged for shipping corn from points in Iowa to Chicago were not fair and reasonable charges for the services rendered. The burden of the complaint is the partiality and favoritism shown to places and shippers in Nebraska. The plaintiff is not seeking to recover money which inequitably and without full value given has been taken from him. He is only seeking to re-

cover money which he alleges is due, not because of any unreasonable charge, but on account of the wrongful conduct of the defendant.

Again, his cause of action is based entirely on a statute, and to enforce what is in its nature a penalty. Suppose that the officials of the defendant company had charged the plaintiff only a reasonable rate for his personal transportation from his home in Iowa to Chicago, and at the same time had, without any just occasion therefor, given to his neighbor across the street free transportation, thus being guilty of an act of favoritism and partiality—an act which tended to diminish the receipts of the railroad company, and to that extent the dividends to its stockholders—such partiality on their part would not, in the absence of a statute, have entitled the plaintiff to maintain an action for the recovery of the fare which he had paid, and thus to reduce still further the dividends to the stockholders. So, but for the provisions of the Interstate Commerce Act, the plaintiff could not recover on account of his shipments to Chicago, if only a reasonable rate was charged therefor, no matter though it appeared that through any misconduct or partiality on the part of the railway officials shippers in Nebraska had been given a lesser rate.

It was, among other reasons, in order to avoid the public injury which had sprung from such conduct on the part of railway officials that the Interstate Commerce Act was passed, and violations of its provisions were subjected to penalties of one kind or another. But it is familiar law that one who is seeking to recover a penalty

is bound by the rule of strict proof. Before, therefore, the plaintiff can recover of this defendant for alleged violations of the Interstate Commerce Act he must make a case showing not by way of inference but clearly and directly such violations. No violation of statute is to be presumed.

* * * * * * * * *

The only right of recovery given by the Interstate Commerce Act to the individual is to the 'person or persons injured thereby for the full amount of damages sustained in consequence of any of the violations of the provisions of this act.' So, before any party can recover under the act he must show not merely the wrong of the carrier, but that that wrong has in fact operated to his injury."

This language is significant in the case at bar because:

Section 71-a of the California Public Utilities Act, in effect upon this action was brought requires an application to the commission for a reparation order respecting "excessive or discriminatory" charges before the carrier can be sued; and

Neither injury nor damage to plaintiff or its assignors is pleaded or proven here.

VI.

On oral argument we cited the case of *Wabash etc. R'y Co.* vs. *Illinois,* 118 U. S. 557, and particularly called attention to the concluding portion

of the Court's opinion, in which the effect of the Illinois statute as an interference with interstate commerce was clearly described.

It may be well to supplement that citation with the opinion delivered by Mr. Justice Peckham in *Louisville & Nashville R. Co.* vs. *Eubank,* 184 U. S. 27. In that case the Kentucky courts had held that Section 218 of the Kentucky Constitution, which was a long and short haul section, and which did not in terms limit its operation to the State, or exclude its operation upon interstate commerce, applied the rate charged by the railroad company from Nashville, Tennessee, to Louisville, Kentucky to intermediate Kentucky points. The Court held that the effect of the decision of the State Court was to embrace cases where the long haul was from a place outside of Kentucky to one within the State, and the short haul was between points on the same line within Kentucky; and that the Kentucky court's theory was that the constitutional provision operated solely upon the rate within Kentucky, making that rate unlawful if it exceeded the rate for the longer distance over the same line in the same direction, although the longer distance was from a point in another State to a point in Kentucky. Mr. Justice Peckham further observes that

> "The contention is that the State does not prescribe or regulate rates outside of its borders; that the company may announce and enforce any rate it pleases regarding interstate commerce."

After discussing the facts, the Court says:

> "We fully recognize the rule that the effect of a State constitutional provision or of any State legislation upon interstate commerce must be direct and not merely incidental and unimportant; but it seems to us that where the necessary result of enforcing the provision may be to limit or prohibit the transportation of articles from without the State to a point within it, or from a point within to a point without the State, interstate commerce is thereby affected, and may be thereby to a certain extent directly regulated, and in that event the effect of the provision is direct and important and not a mere incident."

The Court then comments on the Wabash case, 118 U. S. 557, and also takes up the argument that the State may use an interstate rate as a measure for fixing legal rates on the same line at intermediate points, but disposes of that argument by saying:

> "In the case at bar the State claims only to regulate its local rates by the standard of the interstate rate, and says the former shall be no higher than the latter, but the direct effect of that provision is, as we have seen, to regulate the interstate rate, for to do any interstate business at the local rate is impossible, and if so, it must give up its interstate business or else reduce the local rate in proportion. That very result is a hindrance to, an interference with, and a regulation of, commerce between the States, carried on, though it may be, by only a single company."

Mr. Justice Brewer dissented in an able opinion which endeavored to uphold the right of the State

to use an interstate rate as a measure, although the effect of so doing might be to deprive the terminus outside of the rate-fixing State of competitive advantages. His reasoning, so far as we can ascertain, has not been upheld in any subsequent opinion of the United States Supreme Court.

The development of modern legislation respecting regulation of interstate and intrastate rates has been such since the Eubanks case that perhaps the question will never again be seriously considered. It is clear that for a State to use either a voluntary, water-compelled terminal rate, or a commission-fixed terminal rate, at a point outside the State, as a measure for intrastate rates, is inevitably to burden and hinder the flow of commerce in and out of the State adopting such an archaic rule.

VII.

During the oral argument the following colloquoy took place:

Judge Rudkin: "Suppose the legislature of California had prescribed $1 per hundred from here to Los Angeles and you charged $2 per hundred, could not the party recover it back?

Mr. Booth: Assuming that the rate was proper and accompanied by due process.

Judge Rudkin: That is practically what the Constitution does in this case and what the other side claims.

Mr. Booth: Yes, sir. If, in fact, the rates contended for here were in excess of the lawful rate we do not claim that an action for overcharge cannot be maintained," etc.

It occurs to us in reading the transcript that possibly Judge Rudkin had in mind that assuming the through rate to be the lawful intermediate rate as contended by defendant in error, the shipper might sue without first resorting to the commission. Counsel for plaintiff in error did not and does not so concede. The California Constitution and California Public Utilities Act, to our mind require an application to the commission in all cases of excessive unreasonable or discriminatory collections. No exception is made and as the commission, unlike the Interstate Commerce Commission is a judicial body, we claim that the Federal decisions relied on by counsel are inapplicable on the question of reparation. This case must be determined in that respect solely in view of the California statutory and constitutional provisions as construed by the Supreme Court in *Telephone Company* vs. *Eshleman,* 166 Cal. 640, heretofore cited.

It is not true as intimated by counsel on pp. 159-160 of his brief that the California courts have authoritatively held that if a shipper has a right of action for violation of the long and short haul clause he need not first apply to the commission. The District Court of Appeal so held as mere dictum in *Southern Pacific Company* vs. *Superior Court,* 150 Pacific Reporter 397, referred to on page 150 of our opening brief. The Supreme Court, however, in

response to our petition for transfer and rehearing expressly declined to approve the District Court's views in that respect (150 Pacific Reporter, p. 404; cited in our brief, p. 151).

VIII.

Throughout this litigation counsel has briefed his case on the theory that if we did not analyse, criticise and distinguish each case cited and point made by him, we should thereby be held to concede it. Nevertheless, in this supplement to our oral argument we have merely discussed some of the more salient features of our case, not intending to recede from any position taken in our opening brief and not conceding, by silence, any of the arguments urged by counsel in support of his complaint.

We respectfully submit that defendant in error can succeed in this case only by a judicial interpretation of California constitutional and statutory provisions far different from that placed upon them by their framers, by the people in adopting them, by the carriers and by a uniform acquiescence and contemporaneous construction extending over thirty years.

It is therefore submitted that the judgment of the District Court should be entirely reversed.

Respectfully submitted,

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